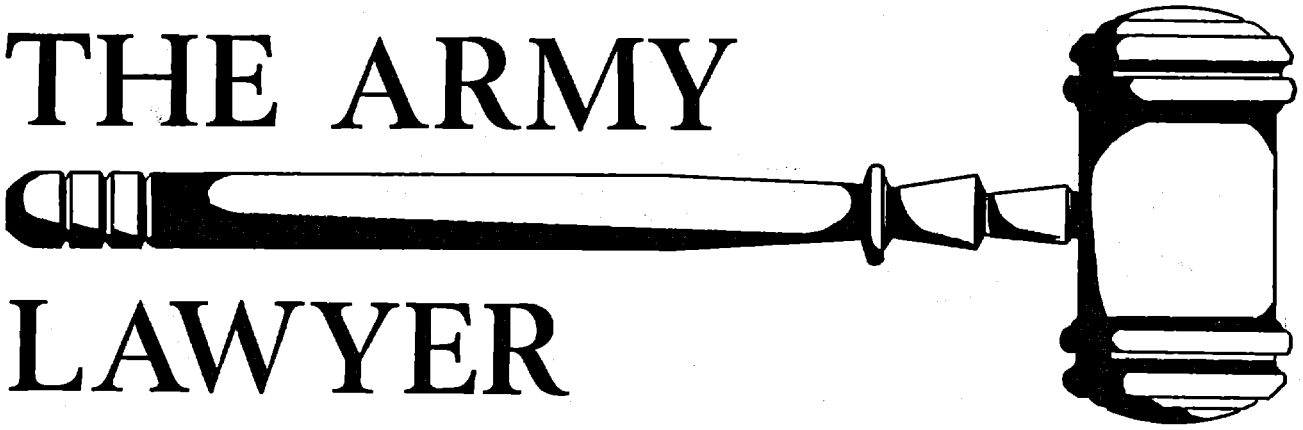
COL Cole

THE ARMY LAWYER



Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-135

March 1984

Table of Contents

Training the Army in Military Justice and Law of War 1

TJAG Letter—Reserve Component Legal Assistance—Policy Letter 84-1 2

Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates 10

Adverse Arbitration in the Federal Sector: A Streamlining of the Appellate Produres? 38

The Korean Armistice: Collective Security in Suspense 43

Administrative and Civil Law Section 52

Automation Developments 53

Criminal Law Section 54

Legal Assistance Items 55

Reserve Affairs Items 57

Enlisted Update 59

CLE News 59

Current Material of Interest 61

Training the Army in Military Justice and Law of War

Captain Jack L. Meyer
Education Developments Officer, TJAGSA

The Judge Advocate General is responsible for the technical supervision of both training in and the administration of military justice.[1] The Judge Advocate General provides overall legal advice and guidance in connection with the Army's implementation of the DOD Law of War Program.[2]

The above two statements task The Judge Advocate General (TJAG) with considerable responsibilities in the areas of military justice and the law of war. Judge advocates, in turn, assist TJAG in carrying out these duties. This article will discuss the regulatory requirements, training developments, and materials available to the judge advocate to assist in accomplishing this training mission.

Training Requirements

Military Justice

There is a chain of regulatory requirements to train enlisted personnel in the subject of military justice. The Uniform Code of Military Justice requires that specific articles of that code be

---

[1]U.S. Dep't of Army, Reg. No. 350-212, Training—Military Justice, para. 6*b* (1972) [hereinafter cited as AR 350-212].

[2]U.S. Dep't of Army, Reg. No. 27-1, Legal Services—Judge Advocate Legal Service, para. 9*g* (1976).

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF

DAJA-ZA 16 February 1984

SUBJECT: Reserve Component Legal Assistance - Policy Letter 84-1

ALL JUDGE ADVOCATES

1. This letter establishes policy guidance for rendering legal assistance services to members of the Reserve Components (RC) serving on Annual Training (AT) and Active Duty for Training (ADT) for periods of 29 days or less and during periods of Inactive Duty for Training (IDT). The legal assistance program for active duty and other eligible personnel is governed by AR 27-3, effective 1 April 1984.

2. RC Judge Advocates designated as legal assistance officers (LAOs) and special LAOs are authorized to render legal assistance to RC personnel serving on AT or ADT for periods of 29 days or less and during IDT. This authorization is given for the specific purpose of enhancing morale and improving readiness so the unit and its members are better able to accomplish their federal mobilization mission. Legal assistance rendered is subject to the availability of adequate time and resources and should not detract from the other training requirements of the unit. Each Staff Judge Advocate (SJA) and Command Judge Advocate is responsible for ensuring that the legal assistance provided by their respective offices does not interfere with the unit training and mobilization mission and that it is limited to the below subject areas:

a. Military Administrative Matters. Upon approval of the Army Command Staff Judge Advocate or State Adjutant General, the RC LAO or special LAO may assist individual RC servicemembers with military administrative matters. RC LAOs and special LAOs will not give legal opinions about military administrative matters. Administrative law opinions are the responsibilities of other staff sections or other lawyers in the SJA office. RC LAOs and special LAOs are prohibited from representing individuals in any administrative elimination actions and before any administrative elimination boards unless directed to do so by the SJA (see AR 135-175 and AR 135-178). RC LAOs and special LAOs may aid individual RC servicemembers prepare rebuttals to other administrative determinations with the approval of the SJA. These rebuttals include actions such as appeals to reports of survey and physical evaluation board determinations. RC servicemembers seeking to file claims against the United States will be sent to the Claims JA who will advise those individuals according to applicable claims regulations. RC LAOs and special LAOs may only advise a claimant on whether to accept an award, request reconsideraton, or file an appeal under a claims statute that provides exclusively for an administrative remedy. Examples are

DAJA-ZA
SUBJECT: Reserve Component Legal Assistance - Policy Letter 84-1

the Military Personnel and Civilian Employees Claims Act or the Military Claims Act. RC LAOs and special LAOs will not represent a client on a claim or rebuttal after available administrative appeals have ended. The client will be referred to the civilian bar for judicial or other remedies outside those of an administrative nature. In Federal Tort Claims Act issues, RC LAOs and special LAOs may discuss procedural aspects of administrative remedies with the client but are specifically precluded from discussing the merits or the value of such a claim.

b. Readiness. RC LAOs and special LAOs will educate and advise RC servicemembers concerning legal documents the servicemembers may need. Simple documents (such as simple wills and powers of attorney) and other routine documents that further the mobilization procedures of the member may be drafted.

3. The legal assistance rendered to RC servicemembers under the authorization of this letter will normally consist solely of advice and counseling. Matters outside the scope of services described in paragraph 2, absent exceptional circumstances, will be appropriately referred to the civilian bar. With regard to referrals, RC LAOs and special LAOs are reminded that they are governed by the Model Code of Professional Responsibility of the American Bar Association and that they should avoid the appearance of favoritism in referrals to their local civilian counterparts. Also, once an RC LAO or special LAO has consulted individually and substantively with a client, that attorney is thereafter prohibited from representing that client in a private capacity for a fee concerning the same general matter or referring that client to another attorney with the expectation of receiving actual or constructive compensation or benefit for the referral.

4. Premobilization legal counseling is a responsibility of RC Judge Advocates imposed by FORMDEPS. It is separate and distinct from the legal assistance role described for RC LAOs and special LAOs herein.

Hugh R. Overholt

HUGH R. OVERHOLT
Major General, USA
Acting The Judge Advocate General

explained to every enlisted member upon entry into active duty and at specified times thereafter.[3] This statutory requirement is implemented in Army Regulation 350-212[4] which specifies that enlisted members will receive instruction in military justice only through Military Justice Courses A and B. The schedules of instruction and lesson plans for these two courses are in Training Circular 27-2.[5] Refresher training for enlisted personnel at the unit level, when the commander deems it necessary, should include those topics covered in Military Justice Course B, TC 27-2.

The regulatory design for officer training is similar. Military justice is one of the common military training subjects that must be taught in the resident phases of both the officer basic course and the officer advanced course.[6] This training is to be presented by programmed instruction. Programmed instruction is conducted in a structured manner according to an approved Program of Instruction (POI), with a prescribed maximum number of hours, containing specific training objectives and concluding with an evaluation of proficiency or knowledge.[7] Specific training objectives and references for military justice are set out in AR 350-212. Optional courses may be found in Army Subject Schedule 27-2.[8]

The Army's military justice training program begins with the entry level soldier and continues throughout his or her career. Enlisted soldiers receive Military Justice Course A (the statutorily mandated explanation of specific UCMJ articles) within six days of coming on active duty.[9] They receive refresher training at their units throughout their career, at each reenlistment, and at their advanced noncommissioned officer courses and the Sergeants Major Academy. Commissioned and warrant officers' military justice training begins at the

---

[3]Uniform Code of Military Justice art. 137, 10 U.S.C. § 937 (1976) [hereinafter cited as UCMJ].

[4]AR 350-212, para. 3

[5]U.S. Dep't of Army, Training Circular No. 27-2, Military Justice (Enlisted Personnel Training) (1983) [hereinafter cited as TC 27-2]. TC 27-2 supersedes Army Subject Schedule 21-10 (1975). The citation to the Article 15 training film on page 8 of TC 27-2 is incorrect. The correct training film number is TF 27-6235.

[6]U.S. Dep't of Army, Reg. No. 350-1, Training—Army Training, table 4-1 (1981) [hereinafter cited as AR 350-1].

[7]*Id.* at para. 4-6*a*.

[8]U.S. Dep't of Army, Subject Schedule No. 27-2, Military Justice (Officer Training) [hereinafter cited as ASubjScd 27-2].

[9]UCMJ art. 137. This training must be repeated after six months.

The Judge Advocate General
Major General Hugh J. Clausen
The Assistant Judge Advocate General
Major General Hugh R. Overholt
Commandant, The Judge Advocate General's School
Colonel William K. Suter
Editorial Board
Colonel Robert E. Murray
Lieutenant Colonel Joseph C. Fowler, Jr.
Captain Stephen J. Kaczynski
Editor
Captain Debra L. Boudreau
Administrative Assistant
Ms. Eva F. Skinner
The Army Lawyer (ISSN 0364-1287)

The Army Lawyer is published monthly by The Judge Advocate General's School. Articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Footnotes, if included, should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is $19.00 a year, $2.50 a single copy, for domestic and APO addresses; $23.75 a year, $3.15 a single copy, for foreign addresses.

Issues may be cited as The Army Lawyer, [date], at [page number]. Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER**: Send address changes to The Judge Advocate General's School, Attn: JAGS-DDL, Charlottesville, VA 22901.

precommissioning level and continues in the officer basic and advanced courses.[10] Commissioned officers attending the Command and General Staff College or the Army War College receive additional military justice instruction. The Judge Advocate General's School, Army (TJAGSA) provides military justice instructors for the Pre-Command Course at the Command and General Staff College. TJAGSA also has senior officer and general officer legal orientation courses available for selected Army officers.[11]

Law of War

The requirement to train Army personnel in the law of war originates with the major international law of war conventions. The Hague and Geneva Conventions, which set out the laws of war, including the treatment of civilians, prisoners of war, and the sick and wounded, require that the signatory nations instruct their armed forces in or disseminate the rules and requirements of each treaty.[12] Recognizing this training requirement, the Department of Defense has directed the secretaries of the military departments to publish instructions and provide training in the law of war to each service member.[13] In the Army, this DOD directive is executed by Army Regulation 350-1 which requires that the law of war be taught to all enlisted and officer personnel in a programmed fashion.[14] Enlisted personnel first receive this training in their initial entry training and receive additional training through their NCOES schools.[15] Officers receive law of war training initially in the officer basic courses; training continues up through the Command and General Staff College level.[16] Refresher training at the unit level is also prescribed. AR 350-216 specifies that formal instruction in the Conventions will be team-taught by officers of the Judge Advocate General's Corps together with officers with command experience.[17] The content of the formal instruction on the Convention is found in Army Subject Schedule 27-1.[18]

These are the regulatory bases for the training requirements in military justice and law of war. It is important that judge advocates are aware of the considerable weight of authority that exists behind the classes they teach in the service schools and in the field. When resources are limited and hours of instruction, facilities, and personnel availability are being negotiated, the smart judge advocate can tactfully use this clout of authority to insure that military justice and law of war training receive the emphasis they merit.

Training Developments

Officer Training

Officer training has been in a state of change during the past six years. In 1977, the Review and Evaluation of Training for Officers (RETO), a Department of the Army study, was

---

[10]AR 350-212, para. 4.

[11]The Judge Advocate General's School, U.S. Army, Annual Bulletin 1983-1984, page 14 (1983).

[12]Hague Convention No. IV of October 18, 1907, Respecting the Laws and Customs of War on Land, art. 1, 36 Stat. 2777 (1910), T.S. No. 539; Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 47, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 48, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, art. 127, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, art. 144, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The Geneva Conventions include the civilian population as possible recipients of this instruction.

[13]U.S. Dep't of Defense, Dir. No. 5100.77, The DOD Law of War Program, paras. E1b, E2e(1) (1979).

[14]AR 350-1, para. 4-6*a*.

[15]*Id.*

[16]*Id.*

[17]U.S. Dep't of Army, Reg. No. 350-216, Training—The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, para. 8*a*(2) (1975) [hereinafter cited as AR 350-216].

[18]U.S. Dep't of Army, Subject Schedule No. 27-1, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907 (1975) [hereinafter cited as ASubjScd 27-1].

published.[19] This study found a great need for the systematic training of officers. Using the terms of educational development specialists, RETO recommended a "job and task" analysis of every officer specialty in the Army.[20] For example, this meant that every skill required and every task performed by an infantry rifle platoon leader would be listed. Once these tasks and necessary skills were identified, training would be developed for that specific target audience, *e.g.*, the infantry lieutenant, and designed to give that officer the skills necessary to perform each task to a given standard. This task-condition-standard training approach resulted in the identification of thousands of tasks to be taught.

These tasks are grouped as either a common task, shared task, or specialty task.[21] Common tasks are those tasks common to many officer specialties, such as, "Put On and Wear the M17 Series Protective Mask." Shared tasks are common to fewer specialties and specialty tasks are common to only one officer specialty. An example of a shared task is, "Deploy Artillery by Medium Lift Helicopter," which is common to artillery and aviation officer specialties. A specialty task is, "Supervise the Engagement of Targets with the 4.2 Inch (107 mm) Mortar," which is performed only by the infantry officer specialty. From these three groupings or "cookbooks" of tasks, each service school commandant, in the role of the officer specialty proponent, selects the tasks to be taught each officer. officer.

TJAG has insured that military justice and law of war training will continue to receive proper emphasis under this new system. TJAGSA has prepared training support packages, *i.e.*, detailed lesson plans, for both subjects in the U.S. Army Training and Doctrine Command (TRADOC) format for precommissioning and officer basic courses.[22] The officer advanced course materials will be sent to TRADOC by June 1984. TJAGSA has also included a military justice overview block of instruction in the Entry Level Warrant Officer Course currently being developed by TRADOC.

The military justice task, "Conduct Preliminary Inquiry Concerning Suspected Offenses and Determine/Recommend Disposition," is an example of these tasks.[23] The task statement includes the context in which this task is likely to occur, the cues to the officer that this task must be performed, the conditions, *i.e.*, material, personnel, and constraints, under which the officer will have to perform the task, and the standard to which this task should be performed. The performance measure portion of the task statement outlines the steps the officer should take to perform this task. For example, under "Conduct Preliminary Inquiry", the requirements include: review documentary evi-

---

[19]U.S. Dep't of Army Study, A Review of Education and Training for Officers (30 June 1978) [hereinafter cited as RETO]. This study was commissioned by the Chief of Staff of the Army in 1977. On 6 June 1979, the Chief of Staff published his decisions on the RETO recommendations in Chief of Staff, U.S. Army, Memorandum No. 210 (6 June 1979). The U.S. Army Training and Doctrine Command (TRADOC) was charged with implementing the comprehensive officer training and education system envisioned by RETO.

[20]*Id.* at page IV-5.

[21]TRADOC Cir. No. 350-83-1, para. 3-3*c* (1983).

[22]TRADOC Manual, Military Qualification Standards I, Training Support Package, Military Justice (1981); Military Qualification Standards I, Training Support Package, Law of War—Geneva and Hague Conventions Training (1981); Military Qualification Standards II, Training Support Package, Military Justice (1981); Military Qualification Standards II, Training Support Package, Law of War—Geneva and Hague Conventions Training (1981) [hereinafter cited as MQS I and II TSPs]. The basic officer level lessons cover six military law and justice tasks:

1) 03-9080.10-1000, Impose Restraint Pending Disposition of an Offense;
2) 03-9080.11-1000, Conduct Preliminary Inquiry Concerning Suspected Offenses and Determine/Recommend Disposition;
3) 03-9080.12-3000, Authorize Searches, Inspections and Inventories;
4) 03-9080.30-2000, Administer Nonjudicial Punishment;
5) 03-9080.20-1000, Initiate and Process Court-Martial Charges; and
6) 03-9060.10-1000, Adhere to and Direct Adherence to the Law of War and Know Your Rights and Obligations as a Prisoner of War Under the Law of War.

[23]TRADOC Manual, Military Qualifications Standards II, Manual of Common Tasks, Task No. 03-9080.11-1000 (1982) [hereinafter cited as MQS II Common Task Manual].

dence; question witnesses; determine availability of witnesses if trial is likely; insure the availability of the accused at trial; obtain, mark, and retain any physical object involved in the offense; advise the accused/suspect of Article 31(b), UCMJ, rights before questioning; and allow accused to obtain counsel. The training support package for this task addresses each of these requirements in sufficient detail to enable the officer to successfully complete this task when it arises in an actual situation.

Another key recommendation of the RETO study was that officer training be sequential and progressive.[24] If a lieutenant is taught the standard of knowing how to perform operator maintenance on the M-16A1 rifle, for example, a captain should learn how to train others in this task or how to develop a company-level rifle maintenance program. This building block concept gave rise to the title of the new officer training system—Military Qualification Standards (MQS) I (precommissioning level), MQS II (lieutenant, one to three years), and MQS III (captain over three years time in service).

Although judge advocates are exempt from the MQS system, it is important that we know what it is. This is how virtually every other officer in the Army will be trained in the future. MQS is the system under which military justice and law of war instruction will be disseminated to officers.

Enlisted Personnel Training

The system for training enlisted personnel has undergone a similar period of change. A cataloguing of tasks for each military occupational specialty (MOS) at each skill level was completed. These tasks were broken down into two categories—MOS specific tasks and common tasks. Training support packages consisting of lesson plans and references were developed for these tasks.

In 1982, the Soldier's Manual of Common Tasks was published.[25] This manual included those tasks deemed critical for the soldier, *i.e.*, necessary for battlefield survival and mission accomplishment. The October 1983 Soldier's Manual includes seventy-one critical tasks, including five law of war tasks.[26] Each soldier through grade E-7 was tested on seventeen of these tasks, including, "Know Your Rights and Obligations as a Prisoner of War", in fiscal year 1983.[27] Training in these tasks begins at the initial entry level and continues through formal school and unit training.

There are seven military justice tasks for enlisted personnel that are taught as specialty tasks to those soldiers with an MOS that requires these specific skills. Additionally, noncommissioned officers at the Advanced Noncommissioned Officer Course, First Sergeant's Course and the Sergeants Major Academy receive instruction in military justice.

These developments in the military justice and law of war areas are part of the changes now being implemented throughout the enlisted training area. The new Common Task Test, the MOS-specific written test, and the soldier's manuals for specific MOS's, such as the 71D Legal Clerk Manual, at specific skill levels are additional results of this new, comprehensive, systematic approach to training.[28]

---

[24]RETO, *supra* note 19, at pages V7, 8.

[25]U.S. Dep't of Army, Field Manual No. 21-2, Soldier's Manual of Common Tasks - Skill Level 1 (1982).

[26]U.S. Dep't of Army, Field Manual No. 21-2, Soldier's Manual of Common Tasks - Skill Level 1 (1983)[hereinafter cited as FM 21-2]. The five law of war tasks are:

1) 181-906-1501, Apply the Customs and Laws of War Governing Forbidden Targets, Tactics, and Techniques;
2) 181-906-1502, Apply the Customs and Laws of War Governing the Treatment of Captives and Detainees;
3) 181-906-1503, Apply the Customs and Laws of War Governing the Protection of Civilians in Time of War;
4) 181-906-1504, Apply the Customs and Laws of War Governing the Prevention and Reporting of Criminal Acts; and
5) 181-906-1505, Know Your Rights and Obligations as a Prisoner of War.

[27]U.S. Dep't of Army, Test Pam. No. CT—983N, Notice for Common Task Test (1983).

[28]The legal clerk soldier's manuals are: U.S. Dep't of Army, Field Manual No. 12-71D 1/2/3, MOS 71D Legal Clerk Soldier's Manual - Skill Level 1/2/3 (1981); U.S. Dep't of Army, Field Manual No. 12-71D 4/5, MOS 71D Legal Clerk Soldier's Manual - Skill Level 4/5 (1981). U.S. Dep't of Army, Field Manual No. 12-71E 2/3/4/5, MOS 71E Court Reporter Soldier's Manual - Skill Level 2/3/4/5 (1981) covers the MOS 71E, Court Reporter, specialty.

The Judge Advocate as Trainer

Judge advocates play an important role in training the Army in military justice and law of war. This role begins at the initial entry level, continues through formal service schooling, and includes refresher training in Army units worldwide. A judge advocate may be assigned as an instructor at an Army service school or be assigned training responsibilities for a unit by the local staff judge advocate. The training audience ranges from soldiers going through basic training to senior level staff officers. Effective preparation and familiarity with the available training resources will assist the judge advocate to successfully accomplish this important task.

Training Considerations

When tasked to present legal instruction, the judge advocate should carefully prepare for the class. Find out what the instruction is supposed to cover. In a formal service school setting, this may clearly be spelled out in the Program of Instruction. The regulations and training schedules mentioned earlier in this article will provide specific guidelines for classes designed to fulfill their requirements. However, unit training requests may be unclear or open-ended. Knowing what you are to teach will prevent unhappy surprises.

Find out about your target audience. What training have they had in the area you are teaching? What is their unit mission? If all your examples in your law of war class involve artillery fire and the unit you are teaching is a medical company, most of the value of your class will be wasted.

After you have found out what and who you are teaching, make sure you will have adequate facilities. A service school may have this well in hand, but even there, you should insure that film or slide projectors and other necessary audiovisual support is available. The facility must be able to hold your audience and enable you to communicate effectively with them.[29]

Finally, preparation involves becoming thoroughly familiar with the material to be presented. The subjects of military justice and law of war are like religion, politics or sports: they are certain to generate questions, strongly held positions, and a wide variety of ideas. The well prepared judge advocate trainer can anticipate many of these questions and prepare concise, accurate responses. An array of training circulars, field manuals, subject schedules, training support packages, and other doctrinal or legal sources exist to help the trainer achieve this level of expertise.

Enlisted Training Resources

Judge advocates providing the statutorily mandated military justice training to initial entrants in the Army should teach Military Justice Course A, found in TC 27-2.[30] Training Film 27-4821, narrated by Mike Connors, covers this required training.[31]

Initial law of war training for enlisted personnel should cover the points found in the lesson plan in Army Subject Schedule 27-1.[32] The five law of war tasks and outlines in FM 21-2, Soldier's Manual of Common Tasks, presents a concise overview of the law of war and include all the teaching points found in Army Subject Scheduled 27-1.[33] Primary resources include The Law of Land Warfare[34] and International Law, Volume II.[35]

Refresher training in military justice can be of several types. If the training is to satisfy the refresher training requirement in Article 137, UCMJ, Military Justice Course B, found in TC 27-2, is the proper reference source.[36] Training

---

[29] An excellent article on preparing for law of war classes is Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, The Army Lawyer, July 1983, at 1. Major Elliott's recommendations to the law of war trainer are equally applicable to the military justice instructor.

[30] TC 27-2, section II.

[31] U.S. Dep't of Army, Training Film No. 27-4821, Uniform Code of Military Justice, Part 1 - Pretrial, Trial, and Post-Trial Procedures (1975). This film, by itself, does not fulfill all UCMJ art. 137 requirements.

[32] ASubjScd 27-1.

[33] FM 21-2.

[34] U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare (1976) [hereinafter cited as FM 27-10].

[35] U.S. Dep't of Army, Pam. No. 27-161-2, II International Law (1962).

[36] TC 27-2, section II.

noncommissioned officers in specific military justice tasks can occur at Army service schools or advanced noncommissioned officer courses. The seven tasks developed by TJAGSA are available to assist in this type of refresher/specialized instruction.[37] The lesson plans cover search and seizure, nonpunitive disciplinary measures, punitive disciplinary measures, obtaining a voluntary statement from a suspect or accused, supervising preparation of a sworn/unsworn statement, record of proceeding under Article 15, UCMJ, and preparation of charge sheets. Unit level refresher classes usually cover a variety of military justice topics. Military Justice Course B, the above-mentioned lesson plans from TJAGSA, and topics of local command interest can be presented.

Law of war training at the unit level should include coverage of the five law of war tasks found in FM 21-2. Use of this manual together with FM 27-10, as well as tailoring the instruction to fit the mission of the unit, will result in effective and interesting instruction. Training Circular 27-10-1, Selected Problems in the Law of War, is also a highly recommended source.[38] This publication contains many excellent scenarios from which an active discussion of the law of war and specific points of the law can be developed. Training films on the law of war also exist to assist in the presentation of law of war principles at the unit level.[39]

Officer Training Resources

Officer training in military justice and law of war begins in the precommissioning phase. The MQS I Manual includes an overview of military justice and law of war.[40] Training support packages on each topic have been distributed to ROTC and OCS instructors. These materials should be used by the judge advocate instructor to insure that a standard base of instruction is presented to all officer candidates.

The MQS II training packages should be used to present military justice and law of war instruction to students in Army service school officer basic courses.[41] These materials cover each subject thoroughly and use of the materials will help insure a standard level of expertise in these subjects for all newly commissioned officers. These materials are updated on a TRADOC schedule, but some areas are likely to become obsolete due to a recent case decision or regulatory change. Instructors should carefully review and update these lesson plans, particularly in continually changing areas such as administrative separations and search and seizure.

Instructors of advanced course officers currently must rely on their own lesson plans for instruction in law of war and military justice. By June 1984, the training support packages for this level of instruction will be published for the Army's modularized officer advanced course pilot program. TJAGSA plans to have TRADOC make copies of these materials available to all service schools. When these training support packages become available, they should be used as the basis for instruction at all officer advanced courses.

Officer refresher training resources include all the basic resource materials. Emphasis should be placed upon the mission of the unit being trained. The suggestions and techniques discussed in Major Elliott's article on training in the law of war are again applicable.[42]

Through a careful analysis of the target audience, a solid familiarity with the subject matter, a thorough review of the training literature, and systematic preparation, the judge

---

[37]These lesson plans are available from Commandant, The Judge Advocate General's School, U.S. Army, ATTN: JAGS-ADN-EDO, Charlottesville, VA 22901. These lesson plans are for government use only.

[38]U.S. Dep't of Army, Training Circular No. 27-10-1, Selected Problems in the Law of War (1979).

[39]See, *e.g.*, U.S. Dep't of Army, Training Film No. 21-4228, The Geneva Conventions and the Soldier (1971); U.S. Dep't of Army, Training Film No. 21-4229, When the Enemy is my Prisoner (1971); U.S. Dep't of Army, Training Film No. 21-4249, The Geneva Conventions and the Military Policeman (1971); U.S. Dep't of Army, Training Film No. 21-4719, The Geneva Conventions and the Medic (1975).

[40]U.S. Dep't of Army, Manual, Military Qualification Standards I, Chap. III (1981).

[41]MQS I and II TSPs.

[42]Elliott, *supra* note 29, at 1.

advocate can insure a quality law of war or military justice presentation. We owe it to the Army and to the Judge Advocate General's Corps to present accurate, interesting and thorough instruction on these subjects. Training the Army in military justice and law of war is an important responsibility and a unique opportunity to perform another vital service to our nation.

Disciplinary Infractions Involving USAR Enlisted Personnel: Some Thoughts for Commanders and Judge Advocates[1]

Lieutenant Colonel Robert R. Baldwin
Staff Judge Advocate, 78th Division (Training)
Edison, NJ
and
Major James E. McMenis
Plans Officer (Reserve Affairs), OSJA
FORSCOM, Ft. McPherson, GA

I. Introduction

The disposition of disciplinary infractions involving United States Army Reserve enlisted personnel (reservists) involves a variety of problems and considerations which differ somewhat from those facing commanders and judge advocates in the disposition of such infractions involving enlisted personnel in the active component of the Army. Since the United States Army Reserve (USAR) is a part of the Army's total force, commanders and judge advocates in both the active and the reserve components should be familiar with the more common problems that may arise from time to time in the disposition of disciplinary infractions involving reservists. The purpose of this article is to familiarize commanders and judge advocates in both components with some of these problems and to provide some thoughts which may be helpful in their solution. The procedures available will, of course, vary according to the duty status of the reservist.

Peculiarities in handling disciplinary infractions involving reservists stem largely from jurisdictional questions under the Uniform Code of Military Justice[2] in relation to the performance by reservists of annual training or active duty for training on the one hand and inactive duty training on the other. Annual training (AT) is a yearly period of training during which unit personnel and certain Control Group personnel are ordered to active duty for not less than fourteen days.[3] Unit personnel may perform AT with their units of assignment or, as with Control Group personnel, they may be attached temporarily, on an individual basis, to an active component command. AT is frequently referred to as "summer camp" but may be performed during any season of the year, whether in one continuous period or in increments. Active duty for training (ADT) is a period of one or more consecutive days during which USAR personnel are ordered to active

---

[1]This article is a revision of the article at *The Army Lawyer*, February 1981, at 5.

[2]10 U.S.C. §§ 801-940 (1982) [hereinafter cited as UCMJ].

[3]*See* 10 U.S.C. § 270(a) (1982); U.S. Dep't of Defense, JCS Pub. No. 1, Dictionary of Military and Associated Terms, at 28 (1979) [hereinafter cited as JCS Pub. 1]; U.S. Dep't of Army, Reg. No. 310-50, Military Publications—Catalog of Abbreviations and Brevity Codes, at 18 (1 Jan. 1981) [hereinafter cited as AR 310-50]. *See also* U.S. Dep't of Army, Reg. No. 135-200, Army Training of Individual Members, paras. 3-12, 3-13 (1 Jan. 1983), ch. 4 (C4, 1 Feb. 1984) [hereinafter cited as AR 135-200]; U.S. Dep't of Army, Reg. No. 140-1, Army Reserve—Mission, Organization, and Training, para. 3-16 (C1, 1 Apr. 1983) [hereinafter cited as AR 140-1].

duty on an individual basis.[4] ADT may be performed at a reserve center or at an active component command, depending on the terms of the ADT orders. For unit personnel, ADT is frequently referred to as "man-days," and because "man-day" spaces are strictly controlled, personnel are infrequently ordered to ADT. Control Group personnel ordered to active duty other than AT serve in an ADT status. For unit personnel, inactive duty training (IDT) is normally training that is performed in 4-hour increments during which such personnel do not acquire an active duty status.[5] IDT is frequently referred to as "weekly drills" or "monthly drills" and may consist of a 4-hour period of duty on a weeknight (a unit training assembly or "UTA") or an 8-hour period of duty on a Saturday or Sunday (a multiple unit training assembly or, when one 8-hour day is involved, a "MUTA 2"). Unit personnel normally perform sixteen hours of IDT during a calendar month. Although IDT credit for retirement purposes is awarded to both unit and Control Group personnel for the completion of Army correspondence courses and other training activities,[6] IDT in the context of this article is generally limited to weekly and monthly drills performed by unit personnel.

While reservists serving on AT or ADT are, like members of the active component, generally subject to UCMJ jurisdiction under article 2(a)(1), the orders pursuant to which AT or ADT is performed contain a self-executing termination date, UCMJ jurisdiction may properly attach with respect to an offense committed by a reservist during a period of AT or ADT. In the case of a reservist held beyond the self-executing termination date for trial by court-martial, however, a jurisdictional problem arises as to offenses committed after the self-executing termination date of the AT or ADT orders and the earlier of the reservist's release after disposition under the UCMJ or recall to active duty pending disposition under the UCMJ.[7] If the correct steps are taken prior to the self-executing termination of AT or ADT orders, this jurisdictional problem can be avoided.

Article 2(a)(3) of the UCMJ appears to subject reservists to UCMJ jurisdiction while performing IDT if certain prerequisites are met. In practice, however, this provision has been given no effect from the standpoint of Army reservists. Thus, USAR commanders and their staff judge advocates must be aware of various alternatives to UCMJ jurisdiction in connection with criminal and disciplinary infractions committed by reservists during IDT. In some instances, depending upon the jurisdictional status of the installation or site where an offense is committed by a reservist, particularly in locations which do not have exclusive federal legislative jurisdiction, disposition by civilian law enforcement authorities is the practical and entirely appropriate alternative to the exercise of UCMJ jurisdiction. On the other hand, because some offenses under the UCMJ have no state law counterpart,[8] USAR commanders may find that it is frequently expedient and appropriate to maintain discipline through the use of administrative alternatives to the exercise of UCMJ jurisdiction.

This article first considers, from the commander's standpoint, the disposition of criminal and disciplinary infractions committed by Army reservists while on AT or ADT, including disposition through the use of nonpunitive disciplinary measures and nonjudicial punishment as alternatives to trial by court-martial or other judicial disposition. Because reservists fre-

---

[4] *See* 10 U.S.C. § 672(d) (1982); JCS Pub. 1, at 4; AR 310-50, at 11. *See also* AR 135-200, chs. 4, 5 (C4, 1 Feb. 1984); AR 140-1, para. 3-27 (C2, 1 Nov. 1983).

[5] *See* 10 U.S.C. § 270(a) (1982); JCS Pub. 1, at 170; AR 310-50, at 51. *See also* AR 140-1, para. 3-4*b*, *c d* (1 Mar. 1983).

[6] *See* U.S. Dep't of Army, Reg. No. 140-185, Army Reserve—Training and Retirement Point Credits and Unit Level Strength Accounting Records, para. 2-4 (15 Sep. 1979), table 2-1 (C3, 1 Aug. 1983) [hereinafter cited as AR 140-185].

[7] *But see* UCMJ art. 2(a)(7) providing jurisdiction over "[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial."

[8] *E.g.*, the purely military offenses under the UCMJ, such as fraudulent enlistment or separation (art. 83), desertion (art. 85), absence without leave (art. 86), disrespect toward a superior commissioned officer (art. 89), willfully disobeying a superior commissioned officer (art. 90(2)), insubordinate conduct toward a warrant officer or a noncommissioned officer (art. 91(2), (3)), failure to obey a lawful order or regulation (art. 92) and mutiny or sedition (art. 94).

quently perform AT and ADT while attached, either individually or as part of a USAR unit, to an active component command for the administration of military justice, the procedures which should be followed in the case of a serious offense committed by a reservist during AT or ADT should be of special interest and concern to active component commanders and their staff judge advocates. Second, of particular interest to USAR commanders and their staff judge advocates is an evaluation of the Army's position with respect to the exercise of UCMJ jurisdiction over reservists performing IDT and the various administrative alternatives to action under the UCMJ which are available in an IDT setting. Although this article focuses on situations involving USAR enlisted personnel, the analysis of UCMJ jurisdiction over offenses committed during AT or ADT, the disposition of such offenses under the UCMJ by nonjudicial and judicial means, and the lack of UCMJ jurisdiction over offenses committed during IDT applies with equal force to USAR officer (including warrant officer) personnel. In situations involving USAR officer personnel, however, initial action is apt to be taken at a higher level of command than the company or battery level where such action is normally taken in cases involving USAR enlisted personnel.

Considerations similar to those applicable to disciplinary problems involving USAR personnel sometimes apply to Army National Guard personnel. However, the state-versus-federal status of National Guard personnel presents a variety of problems inapplicable to USAR personnel, particularly in the area of military justice during both AT and IDT. Accordingly, disciplinary problems involving National Guard personnel are not specifically treated in this article.

II. Reservists in AT or ADT Status

Reservists customarily perform AT and ADT pursuant to orders with a self-executing termination date. They are subject to UCMJ jurisdiction while performing AT and ADT and may be punished under article 15, UCMJ or tried by court-martial for offenses committed during periods of active duty.[9] However, the short duration of most AT and ADT (approximately two weeks in the case of AT) usually precludes trial prior to the termination date of the self-executing AT or ADT orders. After the termination date, UCMJ jurisdiction automatically ceases unless, prior to such date, steps have been taken to attach jurisdiction and make certain that it continues.[10]

Control Group reservists and unit reservists who are *not* performing AT or ADT with their own units of assignment will usually be attached to an active component command for the administration of military justice. The active component commander will fill the military justice role of the reservist's company or battery commander and will be confronted with the same problems that a USAR commander would have to face if, during AT, a member of the command were to commit a disciplinary infraction.

When a reservist on AT or ADT commits, or is reasonably believed to have committed, some form of misconduct or disciplinary infraction, the reservist's unit commander must address the problem of what action to take. Options available to a unit commander include nonpunitive disciplinary measures and, if the misconduct constitutes one or more offenses under the UCMJ, nonjudicial punishment under article 15, UCMJ or trial by court-martial. Trial by court-martial is reserved for serious offenses under the UCMJ and judicial action is required for the imposition of severe penalties. The penalties that a unit commander may impose directly under article 15, UCMJ for minor offenses under the UCMJ are strictly limited. Nonpunitive disciplinary measures may be used in cases of misconduct which do not constitute offenses under the UCMJ and these measures constitute a third alternative which a unit commander should consider even in the case of some forms of misconduct which constitute offenses under the UCMJ.[11]

---

[9]UCMJ art. 2(a)(1).

[10]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 11*a* [hereinafter cited as MCM, 1969].

[11]*See generally* U.S. Dep't of Army, Field Manual No. 27-1, Legal Guide for Commanders, at 8-1 (Options) (18 May 1981) [hereinafter cited as FM 27-1].

A. Nonpunitive Disciplinary Measures

Nonpunitive disciplinary measures[12] are administrative, corrective actions which, although perhaps unpleasant to the reservist, are directed towards correction and instruction and not the infliction of a penalty or punishment. Although misconduct is sometimes deliberate and intentional, it frequently results from carelessness or lack of attention. Nonpunitive disciplinary measures permit the unit commander to teach a reservist the error of his or her ways without inflicting a penalty or seriously tarnishing the reservist's record. A unit commander's authority to take nonpunitive disciplinary measures is a function of the authority to command. Being nonpunitive, these measures are not generally prescribed in the UCMJ. A unit commander's selection of a particular measure may be affected by such factors as the type of misconduct involved and the reservist's state of mind and length of service. More than one nonpunitive disciplinary measure may be taken in an appropriate case. Some of the nonpunitive disciplinary measures available to a unit commander include admonition and reprimand, restraint or restriction, administrative reduction, corrective training, counseling, and the withdrawal of discretionary benefits.

Admonition and Reprimand. In response to a specific act of misconduct, a unit commander may issue an oral or written admonition or reprimand as an administrative, corrective measure.[13] A corrective admonition is a warning that the conduct involved is considered to be misconduct and that its repetition will likely result in the taking of more severe action.[14] A corrective reprimand is a rebuke, reproof or censure (strong criticism) for failing to comply with a required standard of conduct.[15] An oral admonition or reprimand may be administered to a reservist by the reservist's unit commander at a time and place of the commander's choosing.[16] A written admonition or reprimand is prepared in letter form and must contain a statement that the admonition or reprimand is being imposed as an administrative measure and not as nonjudicial punishment under article 15, UCMJ.[17] A written admonition or reprimand may be included for as long as three years in the temporary section of a reservist's Military Personnel Records Jacket (MPRJ), but only after a copy has been referred to the reservist for acknowledgement or rebuttal.[18]

Restraint or Restriction. Apart from authority to impose restriction as a form of nonjudicial punishment under article 15, UCMJ a unit commander may impose restraint or restriction upon a reservist for administrative purposes (*e.g.*, pending inquiry concerning an alleged offense, to insure the reservist's presence within the unit area, or as a precaution to keep the reservist from being exposed to the temptation of further, similar misconduct).[19] A reservist under administrative restraint or restriction may be required to participate in all normal military duties and activities.[20]

---

[12]U.S. Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 3-3*a* (1 Sep. 1982) [hereinafter cited as AR 27-10]. For an evaluation of nonpunitive disciplinary measures available to commanders with respect to enlisted personnel in the active components of the Army, *see* FM 27-1, ch. 8. Apparently, no Army publication provides a similar evaluation applicable to reservists. Because of the limited scope of the cited authority, and the advisory nature of field manuals, reliance upon the references appearing therein may sometimes be misplaced in the case of reservists. Nevertheless, guidelines for the use of nonpunitive disciplinary measures as discussed in FM 27-1, at 8-1, generally apply with equal force to reservists while on AT or ADT.

[13]MCM, 1969, para. 128*c*; AR 27-10, para. 3-3*b*; FM 27-1, at 8-3 (Admonitions and Reprimands). For the rule on suspending favorable personnel actions in connection with admonitions and reprimands, *see infra* note 80.

[14]AR 27-10, glossary at 2; FM 27-1, at 8-3 (Admonitions and Reprimands, Corrective Admonishment).

[15]*Id.*

[16]FM 27-1, at 8-3 (Admonitions and Reprimands, Procedure).

[17]AR 27-10, para. 3-3*b*(2); FM 27-1, at 8-3 (Admonitions and Reprimands, Procedure).

[18]FM 27-1, at 8-3 (Admonitions and Reprimands, Procedure). For further guidance on administrative reprimands, *see* U.S. Dep't of Army, Reg. No. 600-37, Personnel—General—Unfavorable Information, paras. 2-4*a*, 2-6 (15 Nov. 1980). A written admonition or reprimand may be permanently filed in a reservist's Official Military Personnel File (OMPF) upon the order of a general officer. *Id.* at para. 2-4*b*.

[19]AR 27-10, para. 3-3*a*.

[20]MCM, 1969, para. 20*b*.

Administrative Reduction. An enlisted reservist may be administratively reduced by one pay grade for inefficiency or misconduct.[21] "Inefficiency" includes technical incompetence and any act or conduct reflecting that the reservist, "lacks those abilities and qualities required and expected of a person of his [or her] grade and experience."[22] For purposes of administrative reduction, "misconduct" consists of, "those acts or omissions which may be equated to a violation of the punitive articles of the UCMJ."[23] In general, a company or battery commander may reduce a reservist in pay grade E3 or E4;[24] however, a commander below the grade of major may not reduce a specialist or a noncommissioned officer for misconduct.[25] A company or battery commander may recommend to a higher authority the administrative reduction of a reservist in pay grade E5 or above for inefficiency or misconduct and, in the case of a commander below the grade of major, the administrative reduction of a specialist or a noncommissioned officer in pay grade E4 for misconduct. A reservist in pay grade E5 or above, however, may be reduced for inefficiency or misconduct only upon the recommendation of a board composed of officers and senior noncommissioned officers.[26] Written notice of the specific allegations on which a proposed reduction is based must be given to the reservist in all cases, and the reservist must be given the opportunity to submit statements on his or her own behalf.[27] If reduced, a reservist has the right to submit an appeal.[28]

Corrective Training. Corrective training may be used when a reservist demonstrates the need for additional training.[29] Corrective training is appropriate only when there is a direct relationship with the infraction involved (*e.g.*, a reservist who appears in improper uniform may be required to attend special instruction in the correct wearing of the uniform). Corrective training may not be used as a punitive measure and, therefore, must not have even the appearance of punishment. If a reservist believes that additional, corrective training is punitive, then the benefits and effects of all training and instruction are apt to be compromised.

Counseling. Counseling generally involves advising a reservist of his or her errors or omissions.[30] It may be written or oral but is usually oral. Counseling may be performed by a unit commander personally or by a personal representative. In the course of counseling, an effort should be made to determine what caused the reservist's misconduct, why the reservist failed to adhere to the proper standards of conduct, and the reasons for the reservist's negative or indifferent attitude. Properly performed, coun-

---

[21]U.S. Dep't of Army, Reg. No. 140-158, Army Reserve—Enlisted Personnel Classification, Promotion, and Reduction, para. 3-38*a* (C10, 1 Mar. 1983), *b* (C13, 1 Feb. 1984) [hereinafter cited as AR 140-158]. For the rule on suspending favorable personnel actions in connection with administrative reductions, *see infra* note 80.

[22]*Id.* at para. 3-38*a*.

[23]*Id.* at para. 3-38*b* (C13, 1 Feb. 1984).

[24]A commander's authority to reduce from a particular grade generally depends upon his or her authority to promote to that grade. *Id.* at para. 3-2*b* (C8, 15 Feb. 1982). A company or battery commander has authority to promote to pay grades E3 and E4. *Id.* at para. 3-2*a* (C8, 15 Feb. 1982), table 3-1 (C9, 1 Oct. 1982).

[25]*Id.* at para. 3-38*b* (C13, 1 Feb. 1984). Except in cases involving reduction from E4 to E3, specialists and noncommissioned officers may be reduced for misconduct only to a lower specialist or noncommissioned grade, respectively, and only if the lower grade is authorized in the member's military occupational specialty. *Id.*

[26]*Id.* at para. 3-37.

[27]*Id.* at para. 3-38*a*(1) (C10, 1 Mar. 1983), *b* (C13, 1 Feb. 1984).

[28]*Id. But see* AR 140-158, para. 3-39*a* (C10, 1 Mar. 1983), indicating in apparent conflict with para. 3-38*b* that appeals from reductions for misconduct are governed by UCMJ art. 15. This apparent conflict is resolved by applying the more specific rules under UCMJ art. 15 to appeals from administrative reductions for misconduct. There are two procedural differences. First, a reservist who is administratively reduced for inefficiency has 30 days in which to appeal while the appeal period for administrative reductions for misconduct is limited to 15 days. In addition, while appeals from administrative reductions for inefficiency may be reviewed by any qualified officer, appeals from administrative reductions for misconduct must be reviewed by a judge advocate. *Compare* AR 140-158, para. 3-39*b* (C10, 1 Mar. 1983) *with* MCM, 1969, para. 135.

[29]Corrective training as described in FM 27-1, at 8-4, applies with equal force to reservists while on AT, ADT, or while performing IDT. *See also* U.S. Dep't of Army, Reg. No. 600-20, Personnel—General—Army Command Policy and Procedures, para. 5-6 (15 Oct. 1980).

[30]Counseling as described in FM 27-1, at 8-3, applies with equal force to reservists while on AT, ADT or IDT.

seling can provide helpful advice or the necessary inspiration for proper conduct in the future. Depending upon the problem involved, the reservist may be referred to a professional counselor (*e.g.*, a chaplain or a judge advocate).

Withdrawal of Discretionary Benefits. In order to maintain discipline, a unit commander may withhold any privileges he or she is authorized to confer.[31] In addition to the pass privilege, there are other privileges which may be withheld. For example, a reservist may be barred from a specific area or activity (*e.g.*, a reservist who commits an assault in the dayroom may be barred from that room). Although a unit commander cannot withhold privileges over which he or she has no control (*e.g.*, driving on post or PX privileges), a unit commander may recommend the withdrawal of such privileges to a higher authority. The privilege withheld should have a significant relationship with the misconduct or offense involved (*e.g.*, the unit commander should not recommend the withdrawal of PX privileges for an assault in the dayroom). When a unit commander is authorized to confer a privilege that is to be withheld, he or she simply informs the reservist that the privilege has been revoked for a specific period of time.[32] When the privilege to be withheld is within the power of a higher authority to confer, a unit commander may submit a written request through channels that the reservist's privilege be withheld.[33] Grounds for the recommended withdrawal of a privilege should be stated in the request.

Reservists Attached to Active Component Commands. When a reservist on AT or ADT is attached temporarily on an individual basis to an active component command for the administration of military justice, the active component commander filling the role of the reservist's unit commander may determine that misconduct or disciplinary infractions should be disposed of by the use of nonpunitive disciplinary measures. If time does not permit the taking of such measures or if the active component commander is without authority to take a particular measure (*e.g.*, administrative reduction for misconduct), the reservist's conduct may be documented and referred to the commander of his or her unit of assignment for appropriate action after the reservist has returned to an IDT status.

B. Nonjudicial Punishment

When a reservist commits or is reasonably believed to have committed one or more offenses under the UCMJ, the reservist's unit commander (including an active component commander filling the role of a reservist's unit commander) may consider the imposition of nonjudicial punishment under article 15, UCMJ. Although not a hard and fast rule, offenses which are suitable for disposition under article 15, UCMJ are "minor" offenses, namely, offenses which constitute crimes under the UCMJ but not including offenses which, if tried by a general court-martial, could result in the imposition of a dishonorable discharge or confinement at hard labor for more than one year.[34]

Company grade commanders have immediate article 15, UCMJ jurisdiction over personnel assigned or attached to their commands.[35] In most cases, the company or battery is the level of command at which nonjudicial punishment should be administered.[36] While unit commanders should make maximum use of nonpunitive disciplinary measures and should avoid resorting to nonjudicial punishment under article 15, UCMJ, nonjudicial punishment may nevertheless be appropriate to avoid blemishing a reservist's record with a court-martial conviction or to correct and educate a reservist who has in the past not benefited from the use of nonpunitive disciplinary measures.[37] A unit commander's

---

[31]The discussion on the deferment of discretionary benefits appearing in FM 27-1, at 8-2, applies equally to reservists while on AT or ADT. Because of the limited duration of IDT, the withdrawal of discretionary benefits in an IDT setting may be of little constructive value to the maintenance of discipline.

[32]*Id.* (Deferment of Discretionary Benefits, Procedure).

[33]*Id.*

[34]*See* MCM, 1969, para. 128*b*. *See also* MCM, 1969, paras. 126*b*, 127*c* (C7, 15 Apr. 1983); AR 27-10, para. 3-9.

[35]AR 27-10, paras. 3-7*a*, 3-8*a*, *b*.

[36]*See* AR 27-10, para. 3-5*a*.

[37]MCM, 1969, para. 128*c*; AR 27-10, para. 3-2.

authority to impose nonjudicial punishment carries with it the grave responsibility of exercising that authority in a completely judicious manner.[38] Accordingly, unit commanders must be familiar with the requirements, policies, limitations and procedures for the imposition of nonjudicial punishment set forth in chapter XXVI, MCM, 1969; chapter 3, AR 27-10; and chapter 3, FM 27-1.[39]

Upon receiving information that a member of the command may have committed an offense under the UCMJ, the unit commander having immediate article 15, UCMJ jurisdiction should conduct (or cause to be conducted) a preliminary inquiry to determine whether the alleged misconduct actually occurred, whether the misconduct constitutes an offense under the UCMJ, and whether the reservist in question committed the offense.[40] If it is determined, on the basis of the unit commander's preliminary inquiry, that the reservist committed an offense under the UCMJ, the unit commander must then decide upon an appropriate disposition, taking into account such relevant factors as the period of time remaining during AT or ADT and whether the misconduct is sufficiently serious that it would likely be referred to trial by the appropriate court-martial convening authority.

In the course of deciding upon an appropriate disposition, the unit commander may consult with an available USAR judge advocate or, if unavailable, with the staff judge advocate of the installation where the reservist is performing AT or ADT. In any event, however, a unit commander must exercise personal discretion (without interference or direction by any superior) in deciding whether nonjudicial punishment should be imposed at all and, if so, the amount and nature of the punishment.[41] Because a reservist generally has the right to refuse nonjudicial punishment and demand trial by court-martial regardless of the form of proceedings employed,[42] a unit commander considering whether disposition under article 15, UCMJ is appropriate should be aware of the potentially adverse effect on discipline of a reservist's demand for trial by court-martial if it turns out that the reservist is not extended on active duty for purposes of trial or that charges against the reservist are not referred to trial by the appropriate court-martial convening authority. A decision to employ summarized proceedings under article 15, UCMJ carries no assurance that the reservist will not demand trial by court-martial. Therefore, disposition through the use of a nonpunitive disciplinary measure such as a one pay grade reduction for misconduct is apt to be an even more effective means for maintaining discipline than a reduction imposed under article 15, UCMJ since the use of an administrative reduction avoids the risk (or likelihood) that the reservist will demand trial by court-martial.[43]

If a unit commander concludes that disposition under article 15, UCMJ is appropriate, then a further decision must be made as to whether to employ summarized or formal proceedings.[44] When compared with formal proceedings, summarized proceedings are more streamlined; however, the available punishment options are limited to extra duties for four-

---

[38] AR 27-10, para. 3-13.

[39] Although geared toward use by commanders in administering nonjudicial punishment to enlisted personnel in the active components of the Army, the guidance in FM 27-1, ch. 3, is generally applicable in administering nonjudicial punishment to reservists while performing AT or ADT. It should be noted, however, that FM 27-1 has yet to be revised to incorporate the major changes introduced in the 1982 revision of AR 27-10, including the instituting of summarized proceedings under UCMJ art. 15 (AR 27-10, para. 3-16). Thus, FM 27-1, ch. 3, is most relevant to the commander's decision to utilize nonpunitive disciplinary measures or nonjudicial punishment and to formalized proceedings under UCMJ art. 15 (AR 27-10, paras. 3-17, 3-18).

[40] MCM, 1969, para. 32*b* (C5, 1 Apr. 1982); AR 27-10, para. 3-14; FM 27-1, at 2-1 (Report of Offense, Investigation), 3-2 (Procedure (headnote)).

[41] AR 27-10, paras. 3-4, 3-16*a*, 3-17.

[42] *Id.* at paras. 3-16*b*(5), 3-18*d*.

[43] Although misconduct may be considered as reflecting on a reservist's efficiency, a single act of misconduct is not a sufficient basis for a reduction for inefficiency. *See* AR 140-158, para. 3-38*a* (C10, 1 Mar. 1983). Nevertheless, a single act of misconduct, *i.e.*, conduct which may be equated to a violation of the punitive articles of the UCMJ, is a sufficient basis for a reduction for misconduct under AR 140-158, para. 3-38*b* (C13, 1 Feb. 1984). For a discussion of the rules pertaining to administrative reductions for inefficiency and misconduct, *see supra* notes 20-27 and accompanying text.

[44] *Compare* AR 27-10, para. 3-16 *with* AR 27-10, paras. 3-17, 3-18.

teen days, restriction for fourteen days, and/or oral reprimand or admonition.[45] Formal proceedings are required in order for a forfeiture of pay or a reduction in grade to be imposed as punishment under article 15, UCMJ.[46]

Summarized Proceedings. If a unit commander concludes that summarized proceedings under article 15, UCMJ are appropriate, extreme care should be employed to adhere strictly to the procedures set forth in paragraph 3-16 of AR 27-10. While a reservist has the right to demand trial by court-martial even when summarized proceedings are offered, the risk of such a demand is reduced because the commander is required at the outset to explain the maximum punishments which may be imposed.[47] In addition, although a reservist who is offered summarized proceedings normally has twenty-four hours in which to decide whether to demand trial by court-martial, there is no right to consult with counsel before making this decision.[48] The right to counsel is considered unnecessary because of the extreme limitations on the punishments which may be imposed.[49]

Formal Proceedings. If a unit commander concludes that formal proceedings under article 15, UCMJ are appropriate, the scenario attached to AR 27-10 as Appendix B should be used as a guide for conducting the required proceedings, especially in the case of USAR commanders who are involved with article 15, UCMJ on an infrequent basis. Use of Appendix B will help insure that article 15, UCMJ proceedings are conducted in an orderly fashion, in compliance with the requirements of law and regulation applicable to such proceedings, and safeguard the procedural rights of the reservist.[50] Because of the normally short duration of AT and ADT, it may not be unreasonable to allow a reservist considerably less than the normal forty-eight hours to consult with counsel before deciding whether to demand trial by court-martial,[51] and to expedite matters, a unit commander should direct the reservist to a judge advocate for advice.

If a company grade commander feels that formal proceedings under article 15, UCMJ are appropriate, but that the punishment authority is not appropriate for the misconduct of a reservist, the case may be forwarded to the field grade commander with a request that the field grade commander exercise his or her own authority under article 15, UCMJ.[52] In a serious case where a reduction in grade is believed to be the appropriate form of punishment and the company grade commander lacks authority to promote to the grade held by the reservist referral to the field grade commander is entirely appropriate and advisable.[53] On the other hand, where forfeiture of pay is considered to be the appropriate form of punishment, referral to the field grade commander will not increase the maximum forfeiture that may be imposed upon a reservist on AT. In general, cumulative forfeitures from one or more actions under article 15, UCMJ are limited to one-half of a service member's pay per month.[54] This limitation has been extended to reservists on AT so that notwithstanding the statutory limits on the forfeiture authorities of company and field grade commanders under article 15, UCMJ (up to seven days' pay in the case of a company grade commander and up to one-half of one month's pay per month for two months in the case of a field grade commander), no more than one-half of a reservist's pay is subject to forfeiture from

---

[45] *See* AR 27-10, para. 3-16*a*.

[46] *See id.* at para. 3-17*b*. Formal proceedings are also required in all officer (including warrant officer) cases. *Id.* at para. 3-17*a*.

[47] *Id.* at para. 3-16*b*(2).

[48] *Id.* at para. 3-16*c*(2). Depending upon the remaining duration of a reservist's AT or ADT, the 24-hour decision period may be shortened.

[49] *Id.*

[50] *Id.* at para. 3-15. For the rule on suspending favorable personnel actions in connection with nonjudicial punishment, *see infra* note 80.

[51] *See id.* at para. 3-18*f*(1).

[52] *Id.* at para. 3-5.

[53] *See id.* at para. 3-19*b*(6)(*a*). In general, a company grade commander lacks authority to promote to grades E5 and above. *See* AR 140-158, para. 3-2*a* (C8, 15 Feb. 1982), table 3-1 (C12, 1 Aug. 1983).

[54] *Id.* at para. 3-19*b*(7)(*b*).

the time punishment is imposed until the conclusion of AT.[55] For example, if nonjudicial punishment is imposed upon a reservist with ten days of AT remaining, both a company grade commander and a field grade commander are limited to a maximum forfeiture of five full days of pay (*i.e.*, the lesser of one-half of the reservist's pay for the remainder of AT or seven full days of pay in the case of a company grade commander, and the lesser of one-half of the reservist's pay for the remainder of AT or one-half of one month's pay per month for two months in the case of a field grade commander).

C. Judicial Punishment

If a unit commander determines that a reservist's misconduct during AT or ADT involves a serious offense under the UCMJ and that disposition by means of nonpunitive disciplinary measures or nonjudicial punishment is inadequate or inappropriate, the commander must come to grips with disposition by judicial means under the UCMJ or by referral to federal, state or local law enforcement authorities (state or local authorities would have jurisdiction only if the AT or ADT installation or site is *not* subject to exclusive federal legislation jurisdiction).

If the offense involved is not a purely military offense[56] (*e.g.*, larceny, drug abuse, assault) referral to state or local authorities who are willing and able to exercise their jurisdiction is an expedient and clearly appropriate solution. It should be noted that a reservist convicted by a civil court of an offense which if tried under the UCMJ could result in a punitive discharge, or for which the sentence by civil authorities includes confinement for at least six months without regard to suspension or probation, is subject to separation from the USAR.[57] If separation is recommended in such a case, the reservist's service will normally be characterized as "under other than honorable conditions."[58] Approval of a recommendation that a reservist be separated under other than honorable conditions because of a civil conviction will result in the reservist being both reduced to pay grade E1[59] and discharged.[60] Alternatively, if a reservist receives a civil conviction for an offense not warranting discharge, he or she may be administratively reduced one or more pay grades by the commander having reduction authority.[61] In any event, if the offense committed during AT or ADT is a purely military offense, or if after conferring with a USAR or active component judge advocate the unit commander decides to proceed under the UCMJ, various procedural obstacles must be overcome.[62]

In general, court-martial jurisdiction attaches to a reservist for an offense committed while on AT or ADT by taking action with a view towards trial.[63] Apprehension, arrest, confinement, or the preferral of charges is sufficient to attach jurisdiction. Once jurisdiction attaches with respect to an offense prior to the self-executing termination date of AT or ADT orders, it continues for all purposes with respect to the offense, from the preferral of charges through the completion of any punishment imposed.[64] If jurisdiction has not attached prior

---

[55]*See* Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), para. 80354*b* (C70, 7 Dec. 1982). For the maximum forfeiture that may be imposed by any commanding officer, including a company grade commander, *see* UCMJ art. 15(b)(2)(c); MCM, 1969, para. 131*b*(2)(a)(3). For the maximum forfeiture that may be imposed by a commanding officer in the grade of major or above, *see* UCMJ art. 15(b)(2)(H)(iii); MCM, 1969, para. 131*b*(2)(*b*)(*3*).

[56]For examples of purely military offenses, *see supra* note 8.

[57]U.S. Dep't of Army, Reg. No. 135-178, Army National Guard and Army Reserve—Separation of Enlisted Personnel, para. 7-7 (C1, 1 May 1983) [hereinafter cited as AR 135-178]. For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see infra* note 80.

[58]*Id.* at para. 7-3.

[59]*Id.* at para. 2-20; AR 140-158, para. 3-38*c* (C13, 1 Feb. 1984).

[60]AR 135-178, para. 7-10*c*.

[61]AR 140-158, para. 3-38*e* (C10, 1 Mar. 1983).

[62]For a discussion of the various jurisdictional problems associated with self-executing orders, *see* U.S. Dep't of Army, Pamphlet No. 27-174, Military Justice—Jurisdiction of Courts-Martial, para. 4-4*b*. (C1, 1 Feb. 1981)[hereinafter cited as DA Pam 27-174].

[63]MCM, 1969, para. 11*d*.

[64]*Id.*; United States v. Willeford, 5 M.J. 634 (A.F.C.M.R. 1978).

to the self-executing termination date of AT or ADT orders, a reservist generally may not be tried by court-martial for any offense committed while on AT or ADT.[65]

Even if jurisdiction properly attaches with respect to an offense committed before the self-executing termination date of AT or ADT orders, there is no jurisdiction over offenses committed after that date (and, in light of article 2(a)(7), UCMJ prior to sentencing) unless the reservist is properly extended on active duty prior to the self-executing termination of the AT or ADT orders. The problem of post-termination offenses has been considered in two cases.

In *United States v. Mansbarger*,[66] a USAR lieutenant was tried for two periods of AWOL, the second of which occurred after the termination date of his self-executing orders. The charge for the first period of AWOL was preferred before the termination date, but the termination date was not extended until nearly two weeks after it had occurred. The second period of AWOL occurred during this two-week period. On these facts, the Army Board of Review concluded that there was no UCMJ jurisdiction over the second period of AWOL and sustained only the conviction for the first period of AWOL. The board further noted that the exercise of jurisdiction over one offense committed prior to the termination date of self-executing orders does not automatically extend orders so as to provide jurisdiction over offenses committed after the self-executing termination of such orders.[67] In *United States v. Hamm*,[68] a case involving an enlisted member of the Oklahoma National Guard, the government conceded the lack of jurisdiction over charges of larceny and escape committed after the termination date of self-executing orders but while the accused was being properly held for trial on a robbery charge which occurred before the self-executing termination date.

From these decisions, it follows that if the AT or ADT orders of a reservist are properly extended before their self-executing termination to avoid a separation from active duty, court-martial jurisdiction may attach to any offenses committed by the reservist during the extended period of active duty.[69] Extension orders may be oral or written;[70] however, it is advisable to confirm an oral order in writing at the earliest possible time. Otherwise, at a trial involving an offense committed after the original termination date, the issuance of the extension order may become a factual issue.

Whenever possible, offenses committed by reservists during AT or ADT are to be disposed of by administrative action, under article 15, UCMJ, or by referral to federal, state or local civilian law enforcement authorities. Trial by court-martial is limited to cases involving serious offenses which cannot be disposed of by such other means.[71] When court-martial juris-

---

[65]MCM, 1969, para. 11*a*. *See* United States v. Smith, 4 M.J. 265 (C.M.A. 1978) (no jurisdiction over the person for in-service offenses where no action was taken with a view towards trial before the effective date of self-executing orders releasing the accused from active duty in the Navy; the mere drafting of charges before the effective date is insufficient).

[66]20 C.M.R. 449 (A.B.R. 1955).

[67]*Id.* at 454.

[68]36 C.M.R. 656 (A.B.R.), *petition denied*, 16 C.M.A. 655, 36 C.M.R. 541 (1966). In *Hamm*, the accused was on active duty not for AT or ADT but for the purpose of receiving basic combat training and advanced individual training shortly after his initial enlistment. Today, reservists on active duty for such purposes are on initial active duty training (IADT). *See* 10 U.S.C. § 511(d) (1982); JCS Pub. 1, at 174; AR 310-50, at 50; AR 135-200, ch. 3, sec. I (C3, 1 Nov. 1983). IADT is, therefore, another period of active duty performed by reservists pursuant to orders with a self-executing termination date.

[69]DAJA-CL 1975/2215, paras. 3, 4, 6 Aug. 1975.

[70]*See Mansbarger*, 20 C.M.R. at 452; DAJA-CL 1975/2215, para. 3, 6 Aug. 1975.

[71]FORSCOM (AFPR-RC) letter, 20 Sep. 1975, subject: Extension of AT/ADT Orders of USAR Personnel Pending Disciplinary Action, para. 4 [hereinafter cited as FORSCOM letter, 20 Sep. 1975]; TRADOC (ATJA) letter, 3 Aug. 1976, subject: Court-Martial Jurisdiction Over USAR Personnel on Annual Training/Active Duty Training (AT/ADT), para. 4 [hereinafter cited as TRADOC letter, 3 Aug. 1976]. The texts of the FORSCOM and TRADOC letters are reproduced at the conclusion of this article as Appendix A and Appendix B, respectively. A discharge for the good of the service, *i.e.*, in lieu of trial by court-martial is an administrative action sometimes used to dispose of charges preferred under the UCMJ. U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 10 (1 Oct. 1982) [hereinafter cited as AR 635-200]. However, these provisions are *not* applicable to reservists during AT. *See*, AR 635-200, para. 1-6*a*.

diction is exercised, current policy requires that the termination date of the self-executing AT or ADT orders be extended pending the disposition of court-martial charges.[72] For Control Group reservists, the commander of the Army Reserve Personnel Center (Provisional) has authority to extend AT or ADT orders; the area commander has such authority for unit reservists.[73] The request for extension is made by the active component commander exercising general court-martial jurisdiction over the reservist.[74]

D. A Commander's Checklist

In order to insure the prompt and proper processing of a reservist suspected of having committed an offense under the UCMJ while on AT or ADT, the unit commander having immediate article 15, UCMJ jurisdiction should take the following actions *before* the termination date of the reservist's self-executing AT or ADT orders:

1. Conduct a preliminary inquiry into the suspected offense or offenses so that an intelligent disposition can be made.[75] If the preliminary inquiry includes an interview of the suspected reservist, the unit commander should start the interview by warning the reservist of his or her rights under article 31, UCMJ.[76]

2. Consider taking nonpunitive disciplinary measures[77] or imposing nonjudicial punishment under article 15, UCMJ.[78] Nonpunitive disciplinary measures are often the most effective means available to a unit commander for disposing of minor disciplinary infractions, including most minor offenses under the UCMJ.

3. If it is determined that disposition through the use of nonpunitive disciplinary measures or under article 15, UCMJ is not appropriate, or if disposition under article 15, UCMJ is proposed and the reservist refuses nonjudicial punishment and demands trial by court-martial, promptly confer with an available USAR judge advocate or, if unavailable, with the staff judge advocate of the installation or site where the reservist is performing AT or ADT.

4. If it is determined that court-martial jurisdiction will be exercised (*i.e.*, because the situation involves a serious offense as to which federal, state or local civilian law enforcement authorities will not or, in the case of a purely military offense, cannot exercise jurisdiction), promptly take the following additional actions which, except for (f) below, should be carried out concurrently:

(a) Take action against the reservist with a view towards trial.[79]

(b) Initiate suspension of favorable personnel actions.[80] Questions with

---

[72]FORSCOM letter, 20 Sep. 1975, para. 3; TRADOC letter, 3 Aug. 1976, para. 3.

[73]FORSCOM letter, 20 Sep. 1975, para. 2; TRADOC letter, 3 Aug. 1976, para. 2. On 1 Oct. 1983, the commander of the Army Reserve Personnel Center (ARPERCEN) assumed command of Control Group personnel. *See* DCSPER, Permanent Order 173-1, 27 Sep. 1983).

[74]FORSCOM letter, 20 Sep. 1975, para. 3; TRADOC letter, 3 Aug. 1976, para. 3.

[75]MCM, 1969, para. 32*b* (C5, 1 Apr. 1982); FM 27-1, at 2-1 (Report of Offense, Investigation), 3-2 (Procedure (headnote)).

[76]*See* FM 27-1, at 2-2 (Article 31 Warning/Right to a Lawyer).

[77]*See supra* notes 12-33 and accompanying text.

[78]*See supra* notes 34-55 and accompanying text.

[79]*See supra* notes 63-65 and accompanying text.

[80]U.S. Dep't of Army, Reg. No. 600-31, Personnel—General—Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations and Proceedings, para. 6*a*(2)(IC I01, 24 June 1983) [hereinafter cited as AR 600-31]. Favorable personnel actions must be suspended against reserve component personnel whenever action has been initiated, *i.e.*, whenever an official document commencing the action has been signed; for administrative separation or court-martial (all personnel, including officers), for nonjudicial punishment (all personnel in grades E-4 or higher, but not in cases involving summarized proceedings); for administrative reduction in grade (all personnel in grades E-4 to E-9); or for written administrative admonition or reprimand (all personnel, including officers). In addition, favorable personnel actions are generally suspended in cases of reserve component personnel entered in a weight control program under U.S. Dep't of Army, Reg. No. 600-9, Personnel—General—The Army Weight Control Program (15 Feb. 1983) [hereinafter cited as AR 600-9]. AR 600-31, para. 6*a*(11)(IC I01, 24 June 1983). While favorable personnel actions may be suspended pending the disposition of court-martial charges, initiating

respect to the suspension of favorable personnel actions should be directed to the adjutant general of the USAR unit or of the active component installation where the reservist is performing AT or ADT.

(c) Prepare and process the Charge Sheet (DD Form 458).[81]

(d) Read the charges to the accused reservist.[82]

(e) Through appropriate channels, request the adjutant general of the active component installation where the reservist is performing AT or ADT to obtain authority for and to issue orders extending the active duty status of the accused reservist.[83] If not previously stated in the accused reservist's AT or ADT orders, the orders extending the reservist on active duty should attach the reservist to the AT or ADT installation for the administration of military justice. The AT or ADT installation will issue appropriate accession orders assigning the accused reservist to a unit at the installation.

(f) Deliver the charge sheet, the accused reservist, and his or her MPRJ to the gaining commander for processing through normal channels at the AT or ADT installation.

5. Make and retain detailed personal notes of all that transpires with respect to an accused reservist and the suspected offense or offenses. Since time is of the essence in the processing of an accused reservist, all communications should be made by telephone and, if necessary, confirmed in writing at a later time.

---

the suspension of favorable personnel actions in itself is an administrative action and not an action with a view towards trial such as would cause UCMJ jurisdiction to attach to a particular offense. United States v. Hamm, 36 C.M.R. 656, 659-60 (A.B.R. 1966).

[81] *See* AR 27-10, paras. 5-14, 5-15; FM 27-1, ch. 4.

[82] MCM, 1969, para. 32*f*(1)(C5, 1 Apr. 1982); FM 27-1, at 4-5 (Informing the Accused).

[83] *See supra* notes 73-74 and accompanying text.

III. Reservists in IDT Status

A. UCMJ Jurisdiction

Article 2(a)(3) (formerly article 2(3)), UCMJ provides authority for subjecting reservists in all services to the provisions of the UCMJ "while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter." To properly consider the applicability of this jurisdictional grant, it is necessary to review the relevant legislative history.

Prior to enactment of the UCMJ, the Army had no jurisdiction over reservists under the Articles of War. The Navy, however, exercised jurisdiction over "[a]ll members of the Naval Reserve when...authorized training duty with or without pay, drill, or other equivalent instruction or duty...or while wearing a uniform prescribed for the Naval Reserve...."[84] Accordingly, Congress was forced to accommodate these diametrically opposed positions when enacting a uniform code applicable to all the services. The resulting compromise attempted to limit the jurisdiction formerly held by the Navy and to create jurisdiction for the Army and the newly established Air Force. The legislative history clearly indicates the understanding of Congress that this jurisdictional grant would be rarely utilized against reservists in all services during IDT or in connection with other routine reserve functions.

In the House of Representatives, the purpose of what is now article 2(a)(3), UCMJ was explained by Mr. Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense, as follows:

> [W]e should not have for all purposes and all services jurisdiction over Reserve personnel when they are on inactive duty—while they are taking correspondence courses at home or...attending meetings or...wearing their uniform on parades and the various other provisions by virtue

---

[84] Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Forces, 81st Cong., 1st Sess. 859 (1949).

> of which the Navy now does have jurisdiction over their people.
>
> ....
>
> ...[I]t is [however] entirely appropriate ...that they be subject to the sanctions of the uniform code if they commit offenses while [using planes or handling expensive, dangerous or heavy equipment during week-end drills with their units].[85]

Mr. Larkin further explained:

> [W]hen they voluntarily come in under written orders they become subject to the code. The written orders we contemplate would spell out the voluntary nature of this type of duty and the fact that they become subject to the military code, and if they are unwilling to do that they do not come on duty.[86]

Mr. Larkin proposed some additional wording (which was accepted) in an effort to "clearly exclude...other types of inactive duty training" (*e.g.*, correspondence courses).[87] The U.S. Senate also clearly understood that what is now article 2(a)(3), UCMJ was "intended to afford control over persons on inactive duty involving the use of dangerous or expensive equipment—such as weekend flight training."[88]

What, then, has been the Army's position concerning jurisdiction over reservists performing IDT? During debate on the U.S. Senate floor, Senator Kefauver stated that he understood "the Army did not expect to use it at all."[89] Senator Kefauver's understanding has been consistently manifested in a series of opinions of The Judge Advocate General of the Army to the effect that the legislative history indicates that extension of UCMJ jurisdiction to USAR personnel on inactive duty would need to be justified and that no justification can be found.[90] Thus, although article 2(a)(3), UCMJ itself and its legislative history would support limited UCMJ jurisdiction over Army reservists during IDT, there is in fact no such jurisdiction presently available to USAR commanders because of long-standing Army policy.

Each of the other services has approached the issue differently. The Air Force extends jurisdiction to pilot personnel on flight training, and the Navy (including the Marine Corps) extends jurisdiction to all personnel as long as the statutory requirements are met.[91] Although perhaps of merely academic interest from the Army's standpoint, the difficulties encountered by the other services under former article 2(3), UCMJ are nevertheless germane.

In re La Plata[92] involved a Marine reservist who was apprehended for AWOL when he did not report for forty-days of additional ADT to which he had been involuntarily ordered for unsatisfactory performance of training duty.[93] A petition for writ of habeas corpus filed on behalf of the reservist claimed that the reservist was not subject to UCMJ jurisdiction since he had not voluntarily accepted the orders bringing him on duty as required by article 2(3), UCMJ. The district court found that article 2(3), UCMJ did not apply since the reservist had been ordered to active duty and not to inactive duty. It cited the legislative history to show that "Congress intended that subsection 3 apply to inactive reservists who merely attended short periodic drills or training, participated in

---

[85] *Id.* at 860.

[86] *Id.*

[87] *Id.* at 863.

[88] S. Rep. No. 486, 81st Cong., 1st Sess. 7 (1949).

[89] 96 Cong. Rec. 1357 (1950).

[90] JAGJ 1966/8771, 4 November 1966, JAGJ 1958/3016, 6 May 1958, JAGJ 1955/7902, 27 September 1955, JAGJ 1954/9350, 8 December 1954, *cited in* Note, *Constitutional Law: Military Jurisdiction Over Inactive Reservists*, 27 JAG J. 129, 135 n. 41 (Fall 1972). *See also* DAJA-CL 1976/1869, 24 June 1976; JAGA 1967/4322, 20 Sep. 1967, *digested in* 68-8 JALS 17 (DA Pam 27-68-8, at 17).

[91] For a discussion of the implementation of former Article 2(3), UCMJ art. 2(3) in the different services, *see* Saxon, *The Week-end Warrior and the Uniform Code of Military Justice: Does the Military Have Jurisdiction Over Week-end Reservists*, 7 Cal. W.L. Rev. 238 (1970). *See also* Gerwig, *Court-Martial Jurisdiction over Week-end Reservists*, 44 Mil. L. Rev. 123 (1969).

[92] 174 F. Supp. 884 (E.D. Mich. 1959).

[93] The statutory authority for such an ADT order is found at 10 U.S.C. § 270(b) (1982).

week-end flights or who handled dangerous or expensive equipment."[94]

The Court of Military Appeals first considered the application of article 2(3), UCMJ in *United States v. Schuering*.[95] The accused, a Marine reservist, voluntarily accepted orders for IDT. The orders specifically informed him that he was subject to the UCMJ during "regular drills" and "periods of inactive duty training." At a regularly scheduled drill, the accused admitted to wrongfully taking property of the government. Although he requested nonjudicial punishment under article 15, UCMJ, the matter was referred to the next superior command with a recommendation for trial by special court-martial. The accused was placed under no restraint and in fact was allowed to go home at or near the normal departure time. Charges were later referred to trial and served on the accused on non-drill days. He was ordered to "temporary active duty" for trial, convicted pursuant to his plea, and sentenced to a bad conduct discharge, confinement at hard labor for six months, and partial forfeiture of pay for six months. The conviction was reversed on jurisdictional grounds because action had not been taken with a view towards trial (*i.e.*, jurisdiction had not attached to the offense or the accused within the scope of what is now MCM, 1969, para. 11*d*) at a time when the accused was subject to the UCMJ under article 2(3), UCMJ, and because the court-martial lacked jurisdiction over his person at the time of trial since the order to "temporary active duty" for trial was not an order to IDT within the scope of article 2(3), UCMJ. The court's rationale was that the accused had not been placed under any restraint, moral or physical and, "therefore, that the court-martial had no jurisdiction over the accused and the offense at the time of trial."[96] The court noted that:

> A reservist is subject to the Uniform Code of Military Justice only under limited circumstances. These are as follows: (1) He must actually be "on inactive duty training"; (2) the training must be performed pursuant to written orders; (3) the orders must specify that he is amendable to the Uniform Code during his training or drill periods; and (4) the orders must have voluntarily been accepted by him.[97]

In connection with reservists performing IDT, the court further noted, article 3(a), UCMJ[98] notwithstanding, that:

> [A] court-martial may try an accused for an offense committed when he was subject to military law, if he is also subject to such law at the time of trial, notwithstanding there was an interval of time between the offense and the trial when he was not amenable to military law.... We hold, therefore, that in each period of training duty the accused is liable to trial by court-martial for an offense committed by him when subject to military law....[99]

Finally, the court noted that:

> It is well-settled that jurisdiction which attaches by timely commencement of proceedings against the accused survives a change of status on his part.[100]

---

[94]174 F. Supp. at 886.

[95]16 C.M.A. 324, 36 C.M.R. 480 (1966).

[96]*Id.* at 331, 36 C.M.R. at 487.

[97]*Id.* at 326, 36 C.M.R. at 482.

[98]UCMJ art. 3(a) expands UCMJ jurisdiction to avoid the loss of jurisdiction over serious offenses committed in a prior enlistment where there has been a break in service between two periods of enlistment. In *Schuering*, the court rejected the argument that article 3(a) should be construed to limit the jurisdictional grant in what is now article 2(a)(3) over reservists in the performance of IDT. 16 C.M.A. at 328, 36 C.M.R. at 484. In a separate opinion concurring only in the result reached by the majority, Judge Ferguson observed that since the court had found no UCMJ jurisdiction on other grounds:

> [I]t is unnecessary to go further and construe... Article 3... in its application to the troublesome question of exercise of the power to try ordinary citizens by courts-martial on the basis of their tenuous connection with the armed forces through membership in the reserve forces and attendance at inactive duty training drills. Such an extraordinary exercise of military judicial authority over our modern day militiamen bears the closest examination—even from the constitutional standpoint—particularly when the civil courts are open and functioning throughout the Nation with the authority to punish all who transgress its laws, reservist or no.

Id. at 331, 36 C.M.R. at 487.

[99]*Id.* at 328, 36 C.M.R. at 484.

[100]*Id.* at 330, 36 C.M.R. at 486.

The court observed that the Air Force is more restrictive in its use of the jurisdiction conferred by article 2(3), UCMJ quoting an opinion of The Judge Advocate General of the Air Force that "jurisdiction may not be lawfully asserted unless prior to the termination of the training period, jurisdiction has attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, filing of charges or *other similar action*".[101]

For all the jurisdictional prerequisites to be met under what is now article 2(a)(3), UCMJ, a reservist must be subject to the UCMJ by voluntary acceptance of written orders so providing, must commit a violation while subject to the UCMJ, must have action taken against him or her with a view towards trial while so subject, and must be tried while subject to the UCMJ. The holding in *Schuering* emphasizes that every step in the exercise of jurisdiction under article 2(a)(3), UCMJ must be taken during a period of IDT when the accused is properly subject to jurisdiction thereunder, even though there are intervening periods of time when the accused is not on IDT.

The next significant case, *Wallace v. Chafee*,[102] involved a petition for writ of habeas corpus filed by a Marine reservist who was tried, convicted and sentenced (including confinement at hard labor for twenty-one days) by a summary court-martial for refusing to obey the order of a superior commissioned officer to get a haircut. Although the offense occurred during a drill involving classroom training only, the petitioner was a member of a Marine Corps Reserve tank battalion. In the habeas corpus proceeding, the petitioner claimed, among other things, that he had not "voluntarily accepted" the orders subjecting him to UCMJ jurisdiction under article 2(3), UCMJ and, therefore, the summary court-martial which convicted him lacked jurisdiction over both him and the offense. In sustaining jurisdiction, the court noted that as a precondition to enlistment, the petitioner had been required to accept orders subjecting himself to the UCMJ during periods of IDT and that his entering the Marine Corps Reserve (as an obligated reservist in lieu of being subject to the draft) was a purely voluntary act. The court viewed reservists who accept orders subjecting themselves to UCMJ jurisdiction as a condition to their enlistments as being prohibited from unilaterally withdrawing acceptance subsequent to enlistment. Despite the legislative history, it found "no indication that Congress contemplated that reservists would manifest their voluntary choice by deciding whether, with respect to a particular drill, to revoke prior acceptance of the UCMJ."[103] The court gave "short shift" to the argument that article 2(3), UCMJ is limited only to situations when a reservist is using dangerous or expensive equipment, refusing to consider the legislative history on this point since the Article itself contains no such limiting language. It noted that as a tank crewman, the petitioner could not seriously contend that he is subject to the UCMJ only when operating a tank. Other arguments, including a constitutional challenge based upon the court's failure to construe the article as narrowly as possible, were rejected.

The last significant case to address the issue of UCMJ jurisdiction over reservists on IDT was *United States v. Abernathy*.[104] The accused was a Coast Guard reservist three and one-half years into a six-year enlistment when he was tried by special court-martial for being drunk on board a Coast Guard vessel and for willfully damaging military property while on IDT. The issue before the Coast Guard Court of Military Review as whether, as required by article 2(3), UCMJ, the accused had voluntarily accepted orders subjecting himself to the UCMJ during perods of IDT. Orders mailed to the accused bearing an endorsement for his signed acceptance provided that "[u]pon voluntary acceptance of these orders, you are subject to the Uniform Code of Military Justice while performing inactive duty in compliance herewith." The accused testified under oath that he had never received these orders, and while the government established that as a part of his

---

[101] OP JAGAF 1953/9, 2 Dig. Ops. 164, *quoted in* 16 C.M.A. at 330, 36 C.M.R. at 486.

[102] 451 F.2d 1374 (9th Cir. 1971) [emphasis supplied by the court].

[103] *Id.* at 1377.

[104] 48 C.M.R. 205 (C.G.C.M.R. 1974).

enlistment contract he had promised to accept them, it was unable to produce a copy of the orders signed by the accused and relied upon the inference of acceptance stemming from the accused's attendance at IDT for more than three years. In setting aside the conviction for lack of jurisdiction under article 2(3), UCMJ, the court held that the accused's promise to accept found in his enlistment contract did not constitute an acceptance. Moreover, it refused to infer acceptance from the accused's performance of IDT for more than three years since a factual acceptance (as distinguished from a fictional or constructive acceptance) is required by article 2(3), UCMJ.[105]

Based upon the relevant legislative history, it seems clear that Congress enacted what is now the article 2(a)(3), UCMJ grant of jurisdiction over reservists performing IDT in all services as a compromise between the former blanket coverage by the Navy and the complete lack of coverage by the Army. The services, however, have not been uniform in their implementation of the article despite the desire of Congress for uniformity. In fact, the Navy seems to have done much the same under the UCMJ as it did under prior law. Nevertheless, the Army seems justified in its "hands off" approach since the issuance of orders of the type contemplated by article 2(a)(3), UCMJ is, in any event, discretionary. If nothing else, the Army has avoided getting embroiled in the jurisdictional questions which have confronted the other services in exercising jurisdiction under article 2(a)(3), UCMJ.[106]

B. Alternatives to UCMJ Jurisdiction at IDT

In view of the absence of any UCMJ jurisdiction over Army enlisted reservists performing IDT, a USAR commander must consider what other methods and measures are available to preserve discipline within his or her command. As with disciplinary problems during AT or ADT, the solutions in an IDT setting will depend largely upon the nature of the misconduct or disciplinary infraction involved.

If the misconduct constitutes a criminal offense under state law, the appropriate solution normally is to turn the matter over to the local civilian law enforcement authorities. Although such a solution may be frustrated if the offense takes place at a location subject to exclusive federal legislative jurisdiction, many USAR training facilities are at locations which are subject to local jurisdiction.

Most misconduct in an IDT setting will be in the nature of purely military offenses. In such circumstances, the nonpunitive disciplinary measures of admonition and reprimand,[107] administrative reduction,[108] corrective training[109] and counseling[110] are fully available to the USAR commander. In appropriate cases, these methods can be utilized with great effect. For example, just as an administrative reduction for misconduct is frequently more effective than a reduction imposed as nonjudicial punishment in an AT setting, an administrative reduction for misconduct (and the loss of pay which necessarily results) is apt to be the most effective means of dealing with serious breaches of discipline in an IDT setting. Depending upon the nature of a reservist's behavior or misconduct and a variety of other factors, additional

---

[105]The *Abernathy* case is similar in its procedural posture to Mangsen v. Snyder, 1 M.J. 287 (C.M.A. 1976), involving a Navy reservist. In both cases, the military judge granted defense motions to dismiss for lack of jurisdiction. In *Abernathy*, the convening authority overruled the military judge and returned the case for trial as was permitted prior to United States v. Ware, 1 M.J. 282 (C.M.A. 1976). In *Mangsen*, however, the convening authority returned the case for reconsideration by the military judge who then reversed himself. The Court of Military Appeals granted a petition for extraordinary relief and reversed the judge's second ruling (thus reinstating the earlier dismissal) on the ground, consistent with the holding in *Ware*, that absent any additional evidence or legal argument, the first ruling, based upon the judge's independent legal judgment, was correct. Unfortunately, except for stating them in a footnote, the court did not discuss the jurisdictional issues under former UCMJ art. 2(3) which had been raised by the defense motion.

[106]For a further discussion of the various problems encountered by the other services in exercising UCMJ jurisdiction under what is now UCMJ art. 2(a)(3), *see* DA Pam 27-174, para. 4-3*d*.

[107]*See supra* notes 13-18 and accompanying text.

[108]*See supra* notes 21-28 and accompanying text.

[109]*See supra* note 29 and accompanying text.

[110]*See supra* note 30 and accompanying text.

administrative alternatives include entry level separation for unsatisfactory performance or conduct; separation for unsatisfactory performance, misconduct or homosexuality; transfer to the Individual Ready Reserve (IRR) for unsatisfactory participation; and bar to reenlistment.

The term "separation" as used in the context of AR 135-178, the Army regulation governing the separation and discharge of enlisted reservists, at first appears to be misleading, for in addition to discharge it also means transfer from a troop program unit to the IRR.[111] Thus, although separated, a reservist is not necessarily discharged from the USAR. Other definitional concepts which are essential to an understanding of the separation of enlisted reservists for reasons other than the expiration of their enlistments include "entry level status", "statutorily obligated member" and "contractually obligated member". A reservist is generally in "entry level status" from the moment of initial enlistment until either 180 days after beginning training if ordered to IADT for a continuous period or ninety days after beginning the second phase of IADT (advanced individual training) if ordered to IADT in two phases.[112] Since enlistment may not be concurrent with beginning training a new reservist is frequently in entry level status for a period in excess of 180 days following the date of enlistment. In general, a "statutorily obligated member" is a reservist who is currently serving under a six-year statutory service obligation upon initial entry into the armed forces (*i.e.*, a nonprior service reservist).[113] Although serving initial enlistments in the armed forces, male reservists whose entry was prior to 10 November 1979 and who were age 26 or older upon entry, female reservists whose entry was after 31 January 1978 and prior to 10 November 1979 and who were age 26 or older upon entry, female reservists regardless of age upon entry whose entry was prior to 1 February 1978, and male and female reservists who were age 26 or older upon execution of their service agreements and whose service agreements were executed after 9 November 1979 and before 10 December 1979 and reflect no statutory service obligation are *not* treated as statutorily obligated members.[114] A "contractually obligated member," on the other hand, is virtually any other reservist, including a reservist who is serving under an enlistment contract and either has completed a statutory service obligation or never acquired one.[115]

In order to retain potential mobilization assets, it is Army policy to transfer most statutorily and contractually obligated members approved for separation to the IRR pending the completion of their service obligations; only those who have no mobilization potential are discharged.[116] Members in entry level status, however, are normally discharged upon separation if they have not completed basic training or its equivalent.[117]

Entry Level Separation for Unsatisfactory Performance or Conduct. Not all newly recruited reservists are suitable for military service and entry level separations can be utilized by commanders as a means of separating unqualified reservists.[118] Specifically, a reservist in entry level status may be separated if it appears that he or she cannot or will not adapt socially or emotionally to military life, or cannot meet the minimum standards prescribed for successful completion of required training, whether due to lack of aptitude, ability, motivation or self-discipline.[119] A reservist in entry level status may also be separated if he or she has demon-

---

[111]Reserve Components Personnel UPDATE No. 7, consolidated glossary at 10 (1 Feb. 1984) [hereinafter cited as Reserve UPDATE].

[112]*Id.* at 8.

[113]*Id.* at 11; U.S. Dep't of Army, Reg. No. 135-91, Army National Guard and Army Reserve—Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures, para. 2-1 (1 Feb. 1984) [hereinafter cited as AR 135-91].

[114]*See* AR 135-91, para. 2-1*a*(1)-(3),*b*.

[115]Reserve UPDATE, at 7. *See also* AR 135-91, para. 2-2.

[116]AR 135-178, paras. 1-22, 1-23. The completion of basic training or its equivalent is normally a sufficient basis on which to decide the existence of mobilization potential; however, other factors must sometimes be considered.

[117]*See id.* at paras. 1-22b, 5-5.

[118]*Id.* at ch. 5 (C3, 1 Feb. 1983). For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 80.

[119]AR 135-178, para. 5-2.1*a*(3)(a),(b) (C2, 1 Nov. 1983).

strated character and behavior characteristics which are incompatible with satisfactory continued service or has failed to meet body fat standards after application of the procedures in AR 600-9 (Personnel—General—The Army Weight Control Program).[120] A reservist separated for any of these reasons while in entry level status receives an "entry level separation;" the period of service is uncharacterized.[121] Eligibility for an entry level separation generally depends upon whether the reservist is in entry level status on the date of notification of the initiation of separation proceedings.[122]

Before an action for entry level separation may be initiated, the reservist must be counseled at least once about his or her deficiencies by a responsible person.[123] Counseling should include the reasons for counseling, the fact that continued behavior of the sort leading to counseling can lead to an entry level separation, and the consequences of such a separation.[124] A memorandum of record must be made of each counseling session.[125] In addition, unit commanders are usually required to have a reservist reassigned to another unit at least once for purposes of rehabilitation.[126] Although counseling may not be waived, rehabilitation may be waived by the separation authority (the area commander in the case of unit personnel) when the reservist's further duty would create serious disciplinary problems or a hazard to the military mission or the reservist, when the reservist has resisted all rehabilitative efforts, or when rehabilitation would not produce the quality of soldier desired by the Army.[127] Nevertheless, because of the uniqueness of military service when compared with civilian occupations, commanders should pursue rehabilitation before initiating action to separate reservists in entry level status for unsatisfactory performance or conduct.[128]

Upon notification that he or she is being considered for an entry level separation because of unsatisfactory performance or conduct, a reservist is asked to request or waive, by indorsement, the right to submit a written rebuttal or statements in his or her own behalf at a future drill date specified in the unit commander's notice.[129] Following receipt of the reservist's rebuttal or statements, or of an indorsement waiving the right to submit such material, the unit commander must make a final decision on whether to retain the reservist or to proceed with separation.[130] If separation is desired, the action is forwarded to the separation authority,[131] and if separation is approved, the reservist is either discharged without characterization of service, other than issuance of an entry level separation, or transferred to the IRR.[132] Normally, a reservist who has completed basic training or its equivalent is transferred to the IRR unless the separation authority determines that the reservist clearly has no potential for useful service under conditions of full mobilization, taking into account the positive motivation of a full mobilization and the probable maturing effect of an additional two or more years of age.[133]

---

[120] *Id.* at para. 5-2.1*a*(3)(c), (d). For a discussion of the Army weight control program, *see infra* note 138.

[121] *See id.* at paras. 1-20*a* (1 Jan. 1983), 5-5.

[122] *Id.* at para. 1-20*a* (1 Jan. 1983).

[123] *See id.* at paras. 1-12b (C1, 1 May 1983), 5-2, 5-2.1*a*(4)(C2, 1 Nov. 1983). At the time of enlistment, all applicants are counseled about the possibility of entry level separation for unsatisfactory performance or conduct. *Id.* at para. 5-3*a* (C1, 1 May 1983).

[124] *Id.* at para. 1-12*b*(1).

[125] *Id.* at para. 1-12*b*(2).

[126] *Id.* at para. 1-12*c*.

[127] *Id.* at para. 1-12*d*. For designation of the separation authority in cases of entry level separation for unsatisfactory performance or conduct, *see* AR 135-178, para. 1-25*a* (C3, 1 Feb. 1984).

[128] *See* AR 135-178, para. 5-2 (C2, 1 Nov. 1983).

[129] *See id.* at para. 5-3*c*(1), figure 5-2 (C3, 1 Feb. 1984). The preferred form for delivering the commander's letter of notification is to the reservist in person at a regularly scheduled training assembly. *Id.* at para. 5-3*c*(1)(a).

[130] *Id.* at para. 5-3*e*.

[131] *Id.* at para. 5-3*e*(2).

[132] *See* AR 135-178, paras. 1-20*a* (1 Jan. 1983), 1-22*b*, 5-5.

[133] *Id.* at para. 1-22*b*.

To allow commanders greater flexibility in processing newly recruited reservists, the bases for entry level separation are, except for failure to meet body fat standards, very broad and open to liberal interpretation. However, if unsatisfactory performance or conduct is related to the fact a reservist in entry level status does not meet medical fitness standards, discharge must be effected for the convenience of the government even though discharge will be in the form of an entry level separation.[134] Nor is an entry level separation for unsatisfactory performance or conduct appropriate in cases of serious misconduct or homosexuality even though the reservist involved is in entry level status.[135] Finally, a female reservist who becomes pregnant while in entry level status and whose performance slips because of her pregnancy should not be considered for an entry level separation, but should instead be given pregnancy counseling.[136]

Separation for Unsatisfactory Performance. Although the procedures for effecting entry level separations for unsatisfactory performance or conduct are designed to facilitate the early separation of newly recruited reservists who are not suitable for military service, timely action may not have been taken while a reservist was in entry level status, or the unsatisfactory performance may not have manifested itself until after a reservist has completed entry level status of even much later in a reservist's military career. Accordingly, commanders are required to initiate action to separate reservists for unsatisfactory performance if, in the commander's judgment, the reservist will not develop sufficiently to participate satisfactorily in further military training, become a satisfactory soldier, or if the factual basis for the commander's determination of unsatisfactory performance is such that the reservist's retention would have an adverse impact on morale or on military order and discipline.[137] Commanders are also required to take action to separate reservists who do not meet body fat standards after application of the procedures prescribed in the Army weight control program (AR 600-9).[138]

---

[134] *Id.* at paras. 1-20*a* (1 Jan. 1983), 4-2, 4-7, 5-4.

[135] *Id.* at para. 5-4. For a discussion of the separate provisions for separations for misconduct (acts or patterns of misconduct) and homosexuality, *see infra* notes 156-193 and accompanying text.

[136] *Id.* at para. 5-2.1*a*(4) (C3, 1 Feb. 1984). For policies and procedures on pregnancy and the options available to a pregnant female reservist, *see* AR 135-91, ch. 4, sec. V.

[137] AR 135-178, para. 6-3*a*(1)(a), (c). For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 80. *See also* AR 135-178, para. 6-9.

[138] *Id.* at para. 6-3*a*(1)(b); AR 600-9, para. 19*j*. Under the Army weight control program, if a reservist fails to meet tabular height and maximum weight standards by age and sex (*see* AR 600-9, appendix A) or meets such standards but, in the commander's judgment, appears to have excessive body fat, he or she is referred to health care personnel, not necessarily a trained physician (*see* AR 600-9, glossary at 1), for a percentage determination of body fat. *Id.* at para. 20*a*, *b*. Although neither AR 600-9 nor any of the references listed in Appendix D to the regulation appears to prescribe the method for determining body fat content, a skin fold caliper technique has been authorized for measuring the body fat content of active personnel (*see* HQDA letter, 1 Apr. 1983, subject: Army Medical Department (AMEDD) Support of the Army Weight Control Program). The same technique has been authorized for USAR unit personnel. *See* FORSCOM letter, 19 Dec. 1983, subject: Medical Guidelines for Implementing AR 600-9 in USARTPU. If a reservist fails to meet tabular body fat standards by age and sex (*see* AR 600-9, para. 19*c*) and if a medical evaluation (necessarily by a trained physician at this point) reveals no disease process causing the excessive body fat, the reservist is classified as overweight and entered in a weight control program. *Id.* at para. 20*b*, *d*, *e*. Reservists who are classified as overweight are considered nonpromotable, are not authorized to attend professional military or civilian schooling, and cannot be assigned to command positions. *Id.* at para. 19*d*. For the rule on suspending favorable personnel actions in connection with personnel while entered in a weight control program, *see supra* note 80. *See also* AR 600-9, para. 20*e*. When a reservist enters a weight control program, health care personnel are required to establish a maximum allowable weight and a safety attainable weight loss goal. *Id.* at para. 20*e*(1). The reservist is removed from the weight control program upon reaching his or her maximum allowable weight or the applicable tabular body fat standard. *Id.* at para. 20*f*. If, however, no weight is lost during the first two months in the weight control program or if there is some weight loss during that period but progress at the end of six months is not satisfactory, steps can then be taken to separate the reservist for unsatisfactory performance, always assuming there is no medical cause for the lack of weight loss or satisfactory progress under the weight control program, *e.g.*, pregnancy in the case of a female reservist. *Id.* at para. 20*e*(2), *g*, *h*, *j*. While the Army weight control program may look good on paper and may even be capable of fair and equitable administration within the active Army, serious problems may be anticipated within the reserve components. Army reserve units are situated at various and diverse locations, and most units lack organic or readily available physicians or other health care personnel. This situation can, and probably will, result in some reservists who exceed maximum tabular weight by height, age and sex being placed directly in a weight control program without ever being screened by health care personnel, together

Before initiating an action to separate a reservist for unsatisfactory performance, a commander must be satisfied (and able to show) that retention of the reservist is likely to have a disruptive effect, that the reservist's performance is unlikely to improve and that the reservist is unlikely to perform effectively in the future.[139] As with the criteria for entry level separation for unsatisfactory performance or conduct, the factual bases for unsatisfactory performance in general (with the exception of failing to meet body fat standards) are largely undefined, leaving much to the discretion of commanders in separating problem reservists. Actions to separate reservists for unsatisfactory performance must be preceded by counseling and rehabilitation measures similar to those employed in connection with entry level separations for unsatisfactory performance or conduct.[140] Indeed, probably because of the Army's greater investment in the training and development of personnel serving beyond entry level status, rehabilitation efforts must be "adequate."[141]

If it appears that a reservist's unsatisfactory performance is due to a personality disorder, the unit commander should require the reservist to undergo a medical evaluation, including a psychiatric or psychological evaluation.[142] If a personality disorder is established, the reservist may be separated either for unsatisfactory performance or, more simply (but not before counseling and rehabilitation), for the convenience of the government.[143] If separated for the convenience of the government, the reservist's service is normally characterized as "honorable"[144] and the reservist is discharged.[145]

Proceedings to separate for unsatisfactory performance always require the appointment of counsel for consultation.[146] However, there is no right to appointed counsel for representation or to formal proceedings before a board of officers in cases involving reservists with less than six years of total active and reserve military service.[147] Only reservists with six or more years of active and reserve service are entitled to formal board proceedings in unsatisfactory performance cases.[148] Following official notification of the commencement of separation proceedings for unsatisfactory performance, the reservist has a 30-day period in which to consult with counsel, to prepare and submit any statements in his or her own behalf and, if appropriate, to request consideration by a board of officers.[149] Upon receipt of the reservist's reply to the official notification, the case is forwarded to the separation authority (the commander of the major USAR command to which the reservist is assigned if the reservist has less than six years of active and reserve service or if the reservist has six or more years of such service and waives

---

with an improper, *i.e.*, in some cases premature, suspension of favorable personnel actions. Thus, a commander without the means to comply properly with the complex procedures of AR 600-9, Appendix C is quite likely to transgress the procedural due process rights of some members of his or her command in an effort to do what he or she believes is expected. Furthermore, such actions could lead to separation proceedings that will never reach a board of officers for impartial evaluation. *See infra* notes 147-48 and accompanying text. Regrettably, these problems are not specifically addressed in AR 135-178 or AR 600-9.

[139]AR 135-178, para. 6-3*a*(2)-(4).

[140]*Id.* at para. 6-6. *See supra* notes 123-28 and accompanying text.

[141]*See* AR 135-178, para. 6-6.

[142]*See id.* at paras. 1-10*a*, 4-8*c*, 6-7.

[143]*See id.* at para. 4-8*a*(4), *d*.

[144]*Id.* at para. 4-8*f*.

[145]There simply is no provision for transferring personnel separated for the convenience of the government because of personality disorders to the IRR. *See id.* at para. 1-22.

[146]*See id.* at paras. 2-4*a*, 6-13 (C1, 1 May 1983). For the definition of "appointed counsel for consultation," *see* Reserve UPDATE, glossary at 6.

[147]*See id.* at para. 2-4*d* (C1, 1 May 1983). For the definition of "appointed counsel for representation," *see* Reserve UPDATE, glossary at 7.

[148]*See id.* at paras. 2-4*d*, 2-9*c* (1 Jan. 1983), figure 2-1.

[149]*See id.* at para. 2-4, figure 2-1. Because of the wide latitude given commanders to determine what factually constitutes unsatisfactory performance, it is very important that commanders express in detail the facts and reasons for the proposed separation when completing paragraph 2 of the letter of notification prescribed by AR 135-178, figure 2-1. It would also seem advisable for the commander to draw conclusions paralleling the requirements of AR 135-178, para. 6-3*a*(2)-(4). *See supra* text accompanying note 139. A reservist's failure to reply to a letter of notification of the basis for a recommended separation within 30 days of receipt constitutes a waiver of various rights, including, if otherwise available, the right to a hearing before a board of officers. *See* AR 135-178, para. 2-9*g* (1 Jan. 1983), figure 2-1, para. 6.

his or her right to formal board proceedings; otherwise, generally, the area commander) for final action, including formal board proceedings if requested by a reservist with six or more years of active and reserve service.[150]

The service of reservists separated for unsatisfactory performance is characterized as "honorable" or "under honorable conditions."[151] Reservists in this category will normally have completed basic training or its equivalent and are, accordingly, transferred to the IRR for the balance of their statutory or contractual service obligations.[152] As an exception, however, reservists separated for unsatisfactory performance who have less than three months to serve under their enlistments are simply discharged at the time of separation.[153]

A female reservist who is pregnant may be separated for unsatisfactory performance when her pregnancy is not the sole factual basis for substandard performance of duty.[154] On the other hand, a reservist who has committed serious acts of misconduct may not be separated for unsatisfactory performance in lieu of separation for misconduct.[155]

Separation for Misconduct (Acts or Patterns of Misconduct). A reservist may be considered for separation for misconduct consisting of minor disciplinary infractions, a pattern of misconduct, or the commission of a serious offense.[156] These grounds for separation for misconduct are in addition to separation for a civil court conviction which was previously mentioned[157] and separation for misconduct in the form of homosexuality which is separately treated.[158] In addition, alcohol and drug abuse offenses may sometimes serve as a basis for separation for misconduct or for separation for unsatisfactory performance.[159]

The commission of a serious offense as a basis for separation for misconduct includes military and civilian offenses which could result in a punitive discharge if the same or a closely related offense were tried under the UCMJ.[160] A pattern of misconduct is somewhat less serious, but includes discreditable involvement with civilian or military authorities and conduct which violates lesser punitive articles of the UCMJ and the time-honored customs and traditions of the Army.[161] Minor disciplinary infractions as a ground for separation for misconduct is a documented pattern of minor military violations not quite so serious as a pattern of misconduct, but serious enough to render the member disqualified for further military service.[162] A reservist in entry level status who has an established pattern of minor disciplinary infractions and who cannot be rehabilitated must be processed for an entry level separation for unsatisfactory performance or conduct and not for misconduct as such.[163]

Acts or patterns of misconduct must be well documented to serve as a basis for separation and, indeed, must be spelled out in detail in the official notification of separation action pre-

---

[150] AR 135-178, para. 6-10. For designation of the separation authority in separation proceedings for unsatisfactory performance, *see id.* at paras. 1-25*a*. (C3, 1 Feb. 1984), *b*, 6-4*b*.

[151] *Id.* at para. 6-20 (1 Jan. 1983).

[152] *Id.* at para. 1-22*b*.

[153] *Id.* at para. 1-22*c*.

[154] *See id.* at para. 6-3*d*. For policies and procedures on pregnancy and the options available to a pregnant female reservist, *see* AR 135-91, ch. 4, sec. V.

[155] AR 135-178, para. 6-3*c*.

[156] *See id.* at para. 7-1*a-c*. For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 80. *See also* AR 135-178, para. 7-5.

[157] *See supra* notes 57-60 and accompanying text.

[158] *See* AR 135-178, para. 7-2*e* (C1, 1 May 1983), ch. 10 (C3, 1 Feb. 1984); *infra* notes 173-193 and accompanying text.

[159] *See* note following AR 135-178, para. 8-1 (1 Jan. 1983). In addition, there is independent authority for the honorable separation of reservists who have voluntarily enrolled in a drug or alcohol rehabilitation program and have failed to become rehabilitated. *See* AR 135-178, ch. 8 (1 Jan. 1983). For the Army's alcohol and drug abuse program, *see* U.S. Dep't of Army, Reg. No. 600-85, Personnel—General—Alcohol and Drug Abuse Prevention and Control Program (1 Dec. 1981; with IC IO5, 11 Aug. 1983)[hereinafter cited as AR 600-85].

[160] AR 135-178, para. 7-11*c* (1 Jan. 1983).

[161] *Id.* at para. 7-11*b*.

[162] *Id.* at para. 7-11*a*.

[163] *Id. See also* AR 135-178, para. 7-2*d*.

pared by the unit commander.[164] The service of a reservist separated for misconduct as such is normally characterized as having been "under other than honorable conditions."[165] As with entry level separations for unsatisfactory performance or conduct and separations for unsatisfactory performance generally, counseling and rehabilitation measures must normally be taken.[166] However, there is no counseling and rehabilitation requirement if the basis for separation for misconduct is the commission of a serious offense.[167]

Separation for misconduct consisting of acts or patterns of misconduct requires the appointment of counsel for consultation and, unless waived by the reservist, the appointment of counsel for representation and formal action by a board of officers.[168] The separation authority (the area commander) is also the convening authority for the required board of officers.[169] Reservists separated for acts or patterns of misconduct are not considered for transfer to the IRR and are, therefore, discharged.[170] In fact, approval of a recommendation that a reservist be separated under other than honorable conditions because of an act or pattern of misconduct will result in the reservist being both reduced to pay grade E1[171] and discharged.[172]

Separation for Homosexuality. Unsuitability or unfitness for further military service sometimes results from homosexual tendencies on the part of a reservist or homosexual acts. In general, homosexuality is incompatible with military service since:

> [t]he presence in the military environment of persons who engage in homosexual conduct, or who by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.[173]

A reservist may be separated for homosexuality on the basis of preservice, prior service or current service conduct or statements. There are three bases for separation: homosexual acts, statements of homosexuality and marriage to a member of the same biological sex.[174]

Engaging in, attempting to engage in or soliciting another to engage in one or more homosexual acts is a basis for separation for homosexuality.[175] For this purpose, a homosexual act is "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose for satisfying sexual desires."[176] In the face of proof of the attempt, solicitation or commission of a homosexual act, a reservist may be retained only if the act was a departure from the member's usual behavior; the act is unlikely to recur (*e.g.*, as where it resulted from immaturity, intoxication, coercion or the desire to avoid further military service); the act was not accomplished by the use of force or coercion or intimidation during a period of military service (*e.g.*, during AT or a period of ADT or IDT); the member's continued service is consistent with the Army's interest in proper discipline and morale; *and* the member neither desires nor intends to engage in any such act again.[177] Under such circumstances, a reservist who became involved in a homosexual act will be retained only if he or she is a nonho-

---

[164] For the notification procedure in cases which may result in formal action before a board of officers, *see* AR 135-178, para. 2-9. *See also* the notice format at AR 135-178, figure 2-1.

[165] *Id.* at para. 7-3.

[166] *Id.* at para. 7-2*d*.

[167] *See id.* at para. 7-2*d*.

[168] *Id.* at paras. 2-9, 7-15, 7-16 (1 Jan. 1983), figure 2-1. A reservist's failure to reply to a letter of notification of the basis for a recommended separation within 30 days of receipt constitutes a waiver of various rights including the right to a hearing before a board of officers. *See* AR 135-178, para. 2-g (1 Jan. 1983), figure 2-1 at para. 6.

[169] *Id.* at para. 1-25*a* (C3, 1 Feb. 1984).

[170] *See* AR 135-178, para. 1-22.

[171] *Id.* at paras. 2-20, 7-20 (1 Jan. 1983); AR 140-158, para. 3-38*c* (C13, 1 Feb. 1984).

[172] *See* AR 135-178, para. 7-18*a*(1) (1 Jan. 1983).

[173] *Id.* at para. 10-2.

[174] *See id.* at para. 10-4.

[175] *Id.* at para. 10-4*a*.

[176] *Id.* at para. 10-3*c*.

[177] *Id.* at para. 10-4*a*(1)-(5).

mosexual and became involved only because of extenuating circumstances.[178]

The mere statement by a reservist that he or she is a homosexual or a bisexual is a basis for separation for homosexuality.[179] For this purpose, a homosexual is any person, whether a biological male or a biological female, "who engages in or desires to engage in, or intends to engage in homosexual acts."[180] A bisexual is one "who engages in or desires to engage in, or intends to engage in homosexual and heterosexual acts."[181] Despite proof of a reservist's statement that he or she is a homosexual or a bisexual, the reservist will not be separated if there is evidence to support a finding that the reservist is in fact not a homosexual or a bisexual.[182]

Finally, the marriage or attempted marriage of a reservist to a person known to be of the same biological sex is a basis for separation for homosexuality.[183] However, if there is evidence to support a finding that the purpose of the marriage or attempted marriage was to avoid or to cause the termination of military service, the reservist will not be separated for homosexuality.[184]

The service of a reservist separated for homosexuality may be characterized as "under other than honorable conditions," but only if during the current term of service the reservist attempted, solicited or committed a homosexual act by the use of force, coercion or intimidation; with a person under age sixteen; with a subordinate in violation of customary military relationships; openly in public view; for compensation; aboard a military vessel or aircraft; or in any other location subject to military control under circumstances prejudicing or likely to prejudice good order, discipline or morale because of the lack of privacy.[185] In all other cases of separation for homosexuality, the reservist's service will be characterized as "honorable" or "under honorable conditions."[186]

If a unit commander has any credible evidence that a member of the command has homosexual tendencies or has engaged or is engaging in homosexual acts, the commander is required to make a thorough and comprehensive inquiry to determine all available facts.[187] The unit commander may refer the case to the local provost marshal for investigation,[188] and since reserve commanders are not on duty on a full time basis, such a referral may be the most expeditious and effective means for ascertaining the facts. If the unit commander determines that probable cause exists for separation because of homosexuality, a separation action will be initiated.[189] Because of the deleterious effect of homosexual conduct or tendencies upon military service, there are no provisions for counseling and rehabilitation measures.

---

[178] *See* note following AR 135-178, para. 10-4*a*(5).

[179] *Id.* at para. 10-4*b*.

[180] *Id.* at para. 10-3*a*.

[181] *Id.* at para. 10-3*b*.

[182] *Id.* at para. 10-4*b*,

[183] *Id.* at para. 10-4*c*.

[184] *Id.*

[185] *Id.* at para. 10-5*a*.

[186] *Id.* at para. 10-5*b*.

[187] *Id.* at para 10-7*a*. The commander's investigation in cases of homosexuality is similar to the preliminary inquiry a commander must make when, during AT or ADT, a member of the command is suspected of having committed a violation of the UCMJ. *See supra* note 75 and accompanying text.

[188] AR 135-178, para. 10-7*a*.

[189] *Id.* To determine probable cause in homosexuality cases, the discussion of the probable cause requirement set forth in FM 27-1, at 2-5, in connection with searches and seizures authorized by commanders, is adaptable as follows:

> There must be more than mere suspicion in the mind of the commander, but absolute proof beyond a shadow of a doubt is not required. In other words, probable cause lies somewhere between suspicion and actual knowledge. The commander must personally conclude, on the basis of the information presented to him [that it is likely the reservist in question committed specific homosexual acts, or is a homosexual, or married or attempted to marry a member of the same biological sex]. The commander's determination that probable cause exists must be reasonable and must be based on facts. It may not be based only on the conclusions of others.

For the rule on suspending favorable personnel actions in connection with administrative separation proceedings, *see supra* note 80. The suspension of favorable personnel actions is not initiated until after the commander's determination of probable cause, and if the commander determines that the allegation of homosexuality is baseless, the suspension of favorable personnel actions is never initiated. *See* AR 135-178, para. 10-7*a*.

Separation for homosexuality requires the appointment of appointed counsel for consultation and, unless waived by the reservist, the appointment of appointed counsel for representation and formal action by a board of officers.[190] Reservists separated for homosexuality are not considered for transfer to the IRR and are, therefore, simply discharged.[191] A reservist separated for homosexuality and discharged under other than honorable conditions is reduced to pay grade E1.[192] So serious is the Army's concern about the adverse effects of homosexuality upon military service that if a board of officers recommends the retention of a reservist despite evidence of homosexual acts or tendencies, the separation authority (the area commander), in lieu of directing retention, may forward the case to the commander of the Reserve Components Personnel and Administration Center for referral to the Secretary of the Army with a recommendation that the Secretary direct the discharge of the reservist for the convenience of the government.[193]

Transfer to the IRR for Unsatisfactory Participation. Misconduct in an IDT setting frequently manifests itself in the form of unexcused absences from scheduled drills. In general, an unexcused absence is any absence that is not excused.[194] Absences due to sickness, injury or some other circumstances beyond the reservist's control may be treated as excused absences and made up in a paid status equivalent training if the excuse is adequately documented by the reservist and then approved by the reservist's unit commander.[195] As an exception to unexcused absences, equivalent training may sometimes be authorized in place of a drill missed by a reservist for a justifiable reason which is beyond the unit commander's authority to excuse.[196]

For IDT purposes, satisfactory participation generally means attending all scheduled training assemblies.[197] Unit commanders are required to document the fourth and each succeeding unexcused absence incurred by a reservist in a 12-month period.[198] The letter of notification used to document unexcused absences is the only required formal counseling on satisfactory participation in addition to orientation procedures intended to insure that all statutorily and contractually obligated members are aware of their service obligations and the requirements for satisfactory participation.[199]

A reservist who accumulates nine or more unexcused absences within a 12-month period must be charged with unsatisfactory participation.[200] Such a reservist may, in the unit com-

---

[190] *See* AR 135-178, para. 2-9, figure 2-1. A reservist's failure to reply to the letter of notification of the basis for a recommended separation within 30 days of receipt constitutes a waiver of various rights, including the right to a hearing before a board of officers. *See* AR 135-178, para. 2-9*g* (1 Jan. 1983), figure 2-1, para. 6.

[191] *See* AR 135-178, para. 1-22.

[192] *Id.* at para. 2-20; AR 140-158, para. 3-38*c* (C13, 1 Feb. 1984).

[193] *See* AR 135-178, para. 10-11*b*(2) (C3, 1 Feb. 1984). For designation of the separation authority in cases of separation for homosexuality, *see* AR 135-178, paras. 1-25*a* (C3, 1 Feb. 1984), 10-6*a*.

[194] *See* AR 135-91, para. 4-9*a*.

[195] *Id.* at paras. 4-2*a*, 4-3, 4-5, 4-6; AR 140-1, para. 3-11 (C1, 1 Apr. 1983). Equivalent training (ET) does not include rescheduled training performed as regularly scheduled training (RST). *See* AR 140-1, para. 3-12 (C1, 1 Apr. 1983).

[196] AR 135-91, para. 4-10. General officer commanders of USAR units are authorized to grant exceptions to unexcused absences. *Id.* at paras. 4-2*b*, 4-10*c*.

[197] *Id.* at para. 3-1*a*.

[198] *See* AR 135-91, para. 4-12*a*, figure 4-1. Although para. 4-12*a* does not require the issuance of a letter of instructions (*see* AR 135-91, figure 4-1) until following a reservist's fourth unexcused absence in a 12-month period, such letters are part of the basic documentary evidence supporting a unit commander's determination of unsatisfactory participation. Thus, despite the apparently relaxed requirement of para. 4-12*a*, a conservative and sensible approach to building a case of unsatisfactory participation against a reservist is for the unit commander to utilize the letter of instructions to document *all* unexcused absences (one letter covering all unexcused absences for a MUTA).

[199] *Id.* at para. 4-4, figure 4-1.

[200] *Id.* at paras. 4-9*b*(1), 4-11*a*, figure 4-1, para. 7. *See id.* at para. 4-11*b*, *c*, for rules applicable to the charging and counting of unexcused absences. For example, one unexcused absence may be charged for each 4-hour segment of IDT missed without authority by a reservist, but no more than four unexcused absences may be charged when a period of IDT missed without authority by a reservist on consecutive days exceeds 16 hours as in the case of a MUTA 5 or a MUTA 6. The 12-month (one-year) period used in

mander's discretion, be either retained in the unit of assignment or transferred directly to the IRR.[201] This policy applies to both statutorily obligated and contractually obligated reservists.[202] Although certainly a form of misconduct, unsatisfactory participation is not a ground for separation for misconduct under AR 135-178.[203] Thus, the service of a reservist transferred to the IRR for unsatisfactory participation is not characterized at the time of transfer.[204] Nor is such a reservist administratively reduced in grade.[205] This policy allowing for the swift disposition of unsatisfactory participants exemplifies the fact that USAR service in a paid status is a privilege to be highly valued.

The procedure for transferring unsatisfactory participants to the IRR is a particularly useful disciplinary tool since under a variety of circumstances a reservist may be charged with an unexcused absence when in fact present for drill. Specifically, the regulations provide that:

> Members present at a scheduled drill will not receive credit for attendance unless they are wearing the prescribed uniform. They must also present a neat and soldierly appearance and perform assigned duties in a satisfactory manner as determined by the unit commander. Members who do not receive credit for attending a drill will be charged with an unexcused absence....[206]

Under this provision, a commander's decision to award an unexcused absence to a reservist who appeared for IDT without wearing the prescribed uniform (*i.e.*, no belt) was judicially upheld.[207] Thus, although present for IDT, a

---

making a determination of unsatisfactory participation begins on the date of a reservist's first unexcused absence. If more than 12 months elapse without the accumulation of nine or more unexcused absences, the original absence is no longer counted and a new 12-month period is established running from the date of the next succeeding unexcused absence (if any). The establishment and re-establishment of 12-month periods is a continuing process. The procedures set forth in AR 135-91, para. 4-12*a*, for notifying reservists of unexcused absences do not apply to personnel transferred to USAR units from the IRR or upon release from active duty who fail to report or cannot be located within 60 to 90 days after such transfer or release. Such personnel may simply be transferred to the IRR without being charged with unsatisfactory participation. *See id.* at para. 4-12*e*.

[201] *Id.* at para. 4-12*b*, *d*.

[202] *Id.* at paras. 4-9*c*, 6-3, 6-4. Although the language in AR 135-91 is permissive, *i.e.*, unsatisfactory participants "may be transferred to the IRR", see the more compelling language in U.S. Dep't of Army, Reg. No. 140-10, Army Reserve—Assignments, Attachments, Details, and Transfers, para. 4-1 (1 May 1983) [hereinafter cited as AR 140-10], *i.e.*, unsatisfactory participants "will be transferred to the IRR". Statutorily obligated members with less than three years of active duty service transferred to the IRR for unsatisfactory participation are assigned to the USAR Control Group (Annual Training (AT)). AR 140-10, paras. 2-2*a* (C3, 1 Feb. 1984), 4-1*b*. Statutorily obligated members with three or more years of active duty service and contractually obligated members transferred to the IRR for unsatisfactory participation are assigned to the USAR Control Group (Reinforcement (Reinf)). *Id.* at paras. 2-2*b*, 4-1*c*. Nonobligated members, *i.e.*, contractually obligated members, who are transferred to the IRR for unsatisfactory participation because of having incurred nine or more unexcused absences in a 12-month period are prohibited from joining a troop program unit in a paid status unless there is no other qualified member to fill the unit vacancy. *Id.* at para. 2-15*e*. For the definition of "nonobligated member" *see* Reserve UPDATE, glossary at 9.

[203] *Compare* AR 135-178 para. 7-1 (C3, 15 Aug. 1980) (regulation superseded) *with* AR 135-178, para. 7-1. In view of the latitute given commanders in applying AR 135-178, ch. 5 (C3, 1 Feb. 1984), it would not appear to be inappropriate for a unit commander to consider processing a newly recruited reservist in entry level status who has accumulated a substantial number of unexcused absences, *e.g.*, five to eight for an entry level separation for unsatisfactory performance or conduct, particularly if the reservist has not completed basic training or its equivalent. For a discussion on entry level separation for unsatisfactory performance or conduct, *see supra* notes 118-136 and accompanying text.

[204] A reservist transferred to the IRR is separated. *See* Reserve UPDATE, glossary at 10. There simply is no provision for characterizing the service of a reservist transferred to the IRR for unsatisfactory participation at the time of transfer. Thus, upon completion of a service obligation, such a reservist will be discharged under honorable conditions and issued an honorable or a general discharge certificate, as appropriate. *See* AR 135-178, paras. 1-18*b* (1 Jan. 1983), 11-1. The rule applicable to other administrative separations requiring the discharge of reservists otherwise transferable to the IRR if they have less than three months remaining on their service obligations also applies to unsatisfactory participants. *See* AR 135-178, para. 1-22*c*.

[205] *Compare* AR 140-158, para. 3-38*d* (C9, 1 Oct. 1982) (paragraph changed) *with* AR 140-158, para. 3-38*d*.

[206] AR 135-91, para. 3-1*a* (C10, 1 May 1983). *See also* AR 140-1, para. 3-9*h* (C1, 1 Apr. 1983).

[207] Byrne v. Resor, 412 F.2d 774 (3d Cir. 1969) (an appeal from the denial of a petition for writ of habeas corpus filed by an enlisted Army reservist ordered to active duty for unsatisfactory participation). Prior to 1980, certain enlisted reservists with five or more unexcused absences within a 12-month period were subject to order to active duty for a period of 24 months, less any period of prior active duty, including AT and ADT. *See* 10 U.S.C. § 673a (1982); AR 135-91, paras. 6-1, 6-2, 6-11 (C3, 1 Dec. 1979) (paragraphs rescinded).

reservist who is out of uniform, fails to present a soldierly appearance, or does not perform assigned duties in a satisfactory manner as determined by the unit commander may be charged with an unexcused absence. In order for such a deficiency to count as an unexcused absence, it must be documented and communicated to the reservist just as in the case of nonattendance.[208]

There are two other bases whereby unit personnel may be charged with unsatisfactory participation and transferred to the IRR. By definition, satisfactory participation includes "[a]ttending and satisfactorily completing the entire period of AT unless excused by proper authority."[209] Therefore, a reservist, whether statutorily or contractually obligated, who fails to attend scheduled AT, or who is at any time AWOL from AT, may be declared an unsatisfactory participant and involuntarily transferred to the IRR.[210]

Finally, satisfactory participation includes "[o]btaining a unit assignment during an authorized leave of absence...."[211] A statutorily obligated member with less than twenty-four months of active duty service who is moving to an area outside of reasonable commuting distance from the unit of assignment (normally a 50-mile radius for units with weeknight drills and a 100-mile radius for units having week-end drills only) and who cannot be reassigned or fails to give proper notice of intent to relocate, is given a 90-day leave of absence in which to join a unit within reasonable distance from his or her new location.[212] A reservist who has been granted a leave of absence and fails to obtain a new assignment may be declared an unsatisfactory participant and, on the 95th day after the effective date of the leave of absence, involuntarily transferred to the IRR.[213] Statutorily obligated members with twenty-four or more months of active duty service and contractually obligated members who cannot be reassigned when moving to a new locality are not given leaves of absence, but are instead transferred directly to the IRR without being charged with unsatisfactory participation.[214]

Bar to Reenlistment. The bar to reenlistment procedure is a means for denying the privilege of reenlistment to certain categories of reservists. It is Army policy that only personnel of high moral character, professional competence and demonstrated adaptability to the requirements of the professional soldier's moral code are offered the privilege of reenlisting in the USAR and that persons who cannot or do not measure up to these standards, but whose separation is not appropriate, will be barred from further servce.[215] A commander may initiate a bar to reenlistment in the case of a reservist against whom separation action was taken which did not result in separation (*e.g.*, in the case of a reservist considered for separation for unsatisfactory performance who was retained).[216] Reservists who are untrainable (*i.e.*, require frequent or continual supervision) or unsuitable (*i.e.*, possess habits detrimental to discipline) or who are generally irresponsible towards their military service (*e.g.*, late for formations, losses of clothing and equipment, substandard personal appearance or hygiene, excessive unexcused absences from scheduled drills) may be considered for a bar to reenlistment.[217]

In preparing a bar to reenlistment (DA Form 4126-R), a unit commander must specify in some detail the basis for the action and recommendation, and the reservist must be given at least thirty days in which to comment.[218] Commanders of major USAR commands may

---

[208]*See* AR 135-91, figure 4-1 at n.1 which specifies "[i]mproper military appearance" and "[u]nsatisfactory performance of assigned duties" are grounds for the charging of an unexcused absence.

[209]*Id.* at para. 3-1*b*.

[210]*Id.* at paras. 4-9*b*(3), *c*, 4-13*a*, *b*(2)(a), 6-3, 6-4.

[211]*Id.* at para. 3-1*c*.

[212]*See id.* at paras. 4-15*a*, *b*, 4-16. For what constitute reasonable commuting distances, *see* AR 140-1, para. 3-8.

[213]AR 140-1, paras. 4-9*b*(2), *c*, 4-15*a*, 4-21.

[214]*See id.* at para. 4-15*a* (C10, 1 May 1983).

[215]U.S. Dep't of Army, Reg. No. 140-111, Army Reserve—US Army Reserve Reenlistment Program, para. 1-28 (C1, 1 May 1983) [hereinafter cited as AR 140-111].

[216]*Id.* at para. 1-29*d*(1).

[217]*Id.* at para. 1-30.

approve a bar to reenlistment if the reservist will have less than ten years of qualifying service for retirement purposes upon completion of the current enlistment,[219] but it takes the action of an area commander to approve a bar to reenlistment in the case of a reservist having ten to eighteen years of retirement qualifying service upon completion of the current enlistment.[220] Area commanders may also approve a bar to reenlistment in the case of a reservist with more than eighteen years of such qualifying service upon completion of the reservist's current enlistment if the current enlistment is extended to the required twenty years of qualifying service for retirement purposes.[221] Once a bar to reenlistment is approved, it must be reviewed by the unit commander at six-month intervals and prior to completion of the reservist's current term of service or assignment to another unit.[222] It is within the unit commander's power to recommend the removal of an approved bar to reenlistment if the reservist's improved performance should so warrant, but removal of a bar requires approval at the same level as was required for initial approval of the bar.[223]

IV. Conclusion

From the survey and brief analysis of the options available to commanders in the disposition of offenses and disciplinary infractions committed by reservists during AT or ADT, several broad guidelines emerge. Every effort should be made to dispose of such matters during AT or ADT through administrative or nonjudicial means. In addition, nonpunitive disciplinary measures (*i.e.*, administrative means) are preferable to nonjudicial punishment in light of the reservist's right to refuse nonjudicial punishment and to demand trial by court-martial, and the fact that court-martial jurisdiction will be exercised only with respect to the serious offenses of reservists which federal, state or local civilian law enforcement authorities are unwilling or unable to prosecute.

With respect to offenses which cannot be disposed of by administrative or nonjudicial means, every effort should be made to have federal, state or local civilian law enforcement authorities assume jurisdiction when such jurisdiction may be exercised with effect. If a reservist's offense is to be disposed of through the exercise of court-martial jurisdiction (*i.e.*, only serious offenses which cannot be disposed of otherwise), action must be taken with a view towards trial before the termination date of the accused's self-executing AT or ADT orders. This date must be extended by competent authority, before it has passed, in order to insure UCMJ jurisdiction over any offenses that the reservist may commit after the original terminal date.

For Army reservists serving in an IDT status, the exercise of UCMJ jurisdiction, either for purposes of nonjudicial punishment or trial by court-martial, has been precluded by Army policy. Thus, USAR commanders must exercise a high degree of personal leadership in disposing of disciplinary infractions. While many infractions that are offenses under state law may be referred to civilian law enforcement authorities for prosecution, purely military offenses must be disposed of by administrative means.

From time to time, it has been suggested that nonjudicial punishment under article 15, UCMJ should be made available to USAR commanders in the disposition of disciplinary infractions during IDT. In a 1976 reply to one such inquiry, TJAG pointed out that any such change could not come quickly because:

---

[218] *Id.* at para. 1-31*b*, *c*. There are some restrictions on the initiation of bars to reenlistment. *See* AR 140-111, para. 1-29*e*. Thus, a bar to reenlistment will *not normally* be initiated during the first 90 days a reservist is assigned to a new command or during the last 90 days before transfer from a command or discharge. If a bar is initiated during the last 90 days before transfer or discharge, the unit commander must explain on DA Form 4126-R why the bar was not initiated earlier.

[219] *Id.* at para. 1-31*a*, table 1-1 (Rule A) (C3, 1 Feb. 1984). In practical terms, a year of qualifying service for retirement purposes is each one-year period during which the reservist has been credited with 50 retirement points. *See* 10 U.S.C. § 1332(a)(2) (1982); U.S. Dep't of Army, Reg. No. 135-180, Army National Guard and Army Reserve—Qualifying Service for Retired Pay Nonregular Service, paras. 2-8 (C5, 1 Oct. 1982), 2-10*b* (C3, 15 Dec. 1978).

[220] AR 140-111, para. 1-31*a*, table 1-1 (Rule B) (C3, 1 Feb. 1984).

[221] *Id.* at paras. 1-29*f*, 1-31*a*, table 1-1 (Rule B, n. 2) (C3, 1 Feb. 1984).

[222] *Id.* at para. 1-32*c* (1 Jan. 1983).

[223] *Id.* at para. 1-32*d*(1).

The only method of accomplishing your desires would be an amendment to Article 15, UCMJ, permitting the imposition of punishment (limited to forfeiture or reductions) on reservists undergoing training during inactive duty training (IDT) but precluding the right to demand trial by court-martial.[224]

In view of the lack of UCMJ jurisdiction over Army reservists during IDT, USAR commanders are left only with administrative means for disposing of disciplinary infractions which are purely military in nature. Administrative alternatives to UCMJ jurisdiction should, of course, never become a substitute for good leadership; however, if their use becomes necessary, USAR commanders should act promptly and with precision. To avoid the appearance of impotency or indifference, commanders should periodically conduct classes explaining the types of discharge that may be issued (*i.e.*, honorable, under honorable conditions, under other than honorable conditions), the bases upon which each may be issued and the likely effects of each type of discharge. Although AR 135-178 requires commanders to provide this information to members of their command and permits the furnishing of a written explanation,[225] an oral presentation by a unit commander in a classroom setting is likely to have a more profound effect upon the impressionable minds of young reservists.

Appendix A

AFPR-RC 20 SEP 1975

SUBJECT: Extension of AT/ADT Orders of USAR Personnel Pending Disciplinary Action

Commanders, CONUSA
Commanders, FORSCOM Installations

1. In view of questions which have arisen concerning the authority for amending orders to extend USAR members on active duty pending disciplinary action, the following is furnished for information and guidance.

2. The Judge Advocate General of the Army has held that Article 2, UCMJ, and paragraph 2-4b, AR 635-200, provide authority for extending Reservists on active duty for court-martial purposes. The Commander, US Army Reserve Components Personnel and Administration Center (RCPAC), St. Louis, Missouri[1] has authority to extend orders in the case of individual Reservists. Unit Reservists may be extended by the applicable CONUS Army Commander.

3. It is the policy of this command that, pending disposition of court-martial charges, orders will be amended by the appropriate authority, upon request of the Active Army commander exercising general court-martial jurisdiction over the Reservist, to extend the period of active duty. Pending receipt of amended orders, the GCM commander having geographical area responsibility will cause the Reservist to be attached for the administration of military justice, to an appropriate Active Army unit if such attachment was not clearly or properly reflected in the original AT/ADT orders.

4. This guidance is limited to those cases involving serious offenses during AT or ADT which may not properly be disposed of under Article 15, UCMJ, by reference to appropriate Federal or State authorities, or by administrative action which may be accomplished either prior to or upon return to inactive status.

5. This guidance may be further supplemented by addressees.

FOR THE COMMANDER:

[224] DAJA-CL 1976/1869, para. 3, 24 June 1976, in response to Memorandum from Chief, Army Reserve (DAAR-Per), to TJAG, 17 Dec. 1975, Extension of UCMJ Provisions to USAR Members During Periods of Inactive Duty Training (IDT).

[225] AR 135-178, para. 1-11.

[1] Effective 31 December 1983, the approval authority is Commander, US Army Reserve Personnel Center (Provisional) (ARPERCEN).

Appendix B

ATJA 3 August 1976

SUBJECT: Court-Martial Jurisdiction Over USAR Personnel on Annual Training/Active Duty Training (AT/ADT)

Commanders, TRADOC Installations

1. This letter is issued for information and to provide guidance on procedures to insure continuing jurisdiction over USAR members who, while on annual training or active duty training commit offenses under the Uniform Code of Military Justice.

2. The Judge Advocate General of the Army has advised that Article 2, Uniform Code of Military Justice, and para 2-4b, Army Regulation 635-200, 15 July 1966, provide authority to amend orders to extend the expiration date of self-executing orders for USAR members on AT/ADT pending disciplinary action. In the case of individual Reservists, the Commander, US Army Reserve Component[s] Personnel [and] Administration Center (RCPAC), St. Louis, MO,[1] has authority to extend such orders. Reservists who are assigned to units may be extended by the appropriate CONUS Army commanders.

3. In order to insure that jurisdiction is preserved over USAR members pending disposition of disciplinary charges, requests for amendment of orders to extend the period of active duty for USAR members will be made by the Active Army commander exercising general court-martial jurisdiction over such Reserve member. Pending promulgation of amended orders, the general court-martial convening authority having geographical area responsibility within TRADOC will cause the Reservist to be attached to the appropriate Active Army unit for the administration of military justice if such attachment was not clearly set forth in the basic active duty orders.

4. This guidance should be reserved to incidents involving serious offenses during AT or ADT which are not properly treated within Article 15, Uniform Code of Military Justice, or by administrative action, or by referral to Federal or State authorities.

FOR THE COMMANDER:

---

[1]Effective 31 December 1983, the approval authority is Commander, US Army Reserve Personnel Center (Provisional) (ARPERCEN).

Adverse Action Arbitration in the Federal Sector: A Streamlining of the Appellate Procedures?

Major Phillip F. Koren
LL.M. Candidate, The George Washington University

The Civil Service Reform Act of 1978[1] was designed as a comprehensive program to reform the federal civil service system; one of its stated goals is the reduction of red tape and costly delay in that system.[2] For the most part it has accomplished that purpose. The tripartite replacement for the Civil Service Commission, consisting of the U.S. Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA), has cleared the air on the scope of responsibility and, in most cases, streamlined appellate review of agency and union or employee actions. However, gaps remain in the "comprehensive program" which, to date, have not been adjudicated by the present judicial review body for the federal person-

---

[1]Pub.L.No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. § 1101 (Supp. II 1978)) [hereinafter cited as the Act].

[2]H. Doc. No. 95-299, Civil Service Reform, Message from the President of the United States Transmitting a Draft of Proposed Legislation to Reform the Civil Service Laws (March 3, 1978).

nel system, the U.S. Court of Appeals for the Federal Circuit.[3]

One area of consternation is the authority granted under 5 U.S.C. § 7121(e), (f)[4] to an arbitrator to hear and decide adverse actions taken against an employee by an agency under 5 U.S.C. §§ 4303[5] (performance), 7512[6] (misconduct or mixed actions) which may fall within the coverage of a negotiated grievance procedure contained in a collective bargaining agreement. The employee, under the former section, is required to elect either to appeal the adverse action through the MSPB to the Federal Circuit Court of Appeals in accordance with 5 U.S.C. §§ 7701, 7703,[7] or pursue the negotiated grievance procedure contained in those sections and resolve the issue through binding arbitration. Where the employee elects to file a grievance which is ultimately submitted to arbitration, the statute authorizes an appeal to the Federal Circuit Court of Appeals in the same manner and under the same rules as if the arbitrator's decision were that of the MSPB.[8]

The interface between these alternative provisions is not perfect. A problem arises under the arbitration procedure because, among other things, an arbitrator's decision under title VII of the Act is neither self-executing nor self-enforcing. However, this potential dilemma does not belong solely to the employee. It also presents a quandry for the agency which has taken the action.

When an adversely affected employee elects to grieve his or her removal under a negotiated grievance procedure, the agency must support its action to the same degree and with the same burdens before the arbitrator as it would if the MSPB were hearing the case. If the award of the arbitrator in reinstating the employee after removal is deficient, the agency seems to have no remedy to correct the deficiency other than noncompliance with the decision of the arbitrator to reinstate the employee. Not only is the agency forced into noncompliance, the union and the employee have no direct method of enforcing the arbitrator's decision. What is the union's and the employee's recourse in this situation?

First, let us briefly review why an agency would not comply with an arbitrator's decision. It is unrealistic to propose that a federal agency would be motivated solely by bad faith. There are other reasons. For instance, where would the agency go to appeal the decision? Under this procedure, the agency can gain review of an arbitrator's decision before the FLRA only on issues separate and distinct from the personnel action, such as grievability or arbitrability under the collective bargaining agreement.[9] For the purposes of this discussion, this is not the case. The agency is also unable to file exceptions to the arbitral award before the FLRA since the action has been processed under the authority of 5 U.S.C. § 7121(f).[10] Other than as mentioned above, the agency may seek FLRA review only if the employee does not have a statutory right of appeal to the MSPB.[11] Until very recently, the agency was even unable to request OPM intervention before the arbitrator under 5 U.S.C. § 7703(d), the statutory prerequisite for gaining judicial review of the matter.[12] This inability to request OPM intervention was considered by the new Federal Circuit Court of Appeals in April 1983. In two orders, that court held that not only is OPM authorized under the Act to request reconsideration of an arbitral decision under 5 U.S.C. §

---

[3]The U.S. Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), and designated as the exclusive judicial review body for the federal personnel system withholding jurisdiction in these cases from the other U.S. Courts of Appeal.

[4]5 U.S.C. § 7121(e), (f) (Supp. II 1978).

[5]5 U.S.C. § 4303 (Supp. II 1978).

[6]5 U.S.C. § 7512 (Supp. II 1978).

[7]5 U.S.C. §§ 7701, 7703 (Supp. II 1978).

[8]5 U.S.C. § 7121(f) (Supp. II 1978). *See* S. Rep. No. 696, 95th Cong., 2d Sess. 111 (1978).

[9]Naval Ordinance Station, Louisville, Ky., 11 F.L.R.A. No. 10, 11 F.L.R.A. 19 (1983).

[10]5 U.S.C. § 7122(a) (Supp. II 1978).

[11]U.S. Soldiers' and Airmen's Home, 11 F.L.R.A. No. 117, 11 F.L.R.A. 692 (1983) (Appeal to the FLRA not barred because the grievant was a member of the excepted service and was not preference eligible).

[12]Devine v. White, 697 F.2d 421 (D.C. Cir. 1983).

7121(f), it is required to do so within the same time limit prescribed by 5 U.S.C. § 7703(b)(1), *i.e.*, thirty days.[13] In addition, the court announced that, as with decisions of the MSPB, the Director, OPM may request intervention before an arbitrator only where, "in his discretion,...the Board [or arbitrator under § 7121(f)] erred in interpreting a civil service law, rule, or regulation affecting personnel management *and that the Board's decision will have a substantial impact on a civil service law rule, regulation, or policy directive.*"[14]

This last requirement makes any direct agency review of the arbitral decision absolutely dependent upon OPM. When OPM elects not to intercede, the agency's avenues of direct review are effectively foreclosed. The only alternative for the agency is not to comply with the arbitral award. It should also be noted here that if the agency fails to request OPM intervention in the matter while not complying, it is subject to an unfair labor practice charge under 5 U.S.C. § 7116(a)(8) for bad faith in not complying with the arbitral award.[15] Therefore, the dilemma facing the agency in the situation where OPM has declined to intervene or, in the alternative, where no intervention is sought is an unfair labor practice charge filed by the union or employee for failure to comply with the arbitral award. Assuming that the agency is not acting in bad faith, but feels that it will be successful in overturning the arbitral award upon judicial or other appellate review, its only recourse is noncompliance.[16]

As noted above, an arbitral award in an adverse action case where the agency has a good faith belief that the award is deficient and will be set aside or modified upon appeal presents a dilemma for the agency. It must expose itself to an unfair labor practice charge in order to gain review. Presently, it is uncertain whether the arbitration award itself is open to challenge in a judicial review of the decision and order resolving the unfair labor practice charge. At the same time, the union or employee also faces a dilemma of sorts because there is a favorable decision from an arbitrator, and therefore, they cannot be considered an "aggrieved party" under the Act for purposes of appealing the decision of the arbitrator. There has been no "adverse" decision. The employee cannot file a new action in federal district court on constitutional grounds for wrongful discharge because the Act stands as a comprehensive statutory framework which Congress intended as the exclusive means of resolution of such claims.[17]

Since there is no jurisdiction in a federal district court on a new cause of action, one would think that the alternative would be a suit to enforce the arbitral award in that same court. Under section 301 of the Taft-Hartley Amendments to the National Labor Relations Act,[18] a private sector union has the statutory right to file an action for enforcement of an arbitral award against an employer. There is no similar grant of jurisdiction under the Act for employees or unions in the federal sector. Without a like statutory grant of jurisdiction, federal sovereignty would prevail and no relief would be forthcoming.

Because the employee timely filed a written grievance in accordance with the provisions of the negotiated grievance procedure, the election to pursue that remedy has been made.[19] This election is unalterable. The employee is therefore barred from processing a second appeal to the MSPB. There would be no dilemma if the employee had elected the statutory appeals procedure to the MSPB. The MSPB has authority to enforce its own orders by certifying to the Comptroller General of the

---

[13]Devine v. Nutt, No. 83-589 (Fed. Cir. Apr. 12, 1983); Devine v. Sutermeister, No. 83-813 (Fed. Cir. Apr. 12, 1983).

[14]5 U.S.C. § 7703(d) (Supp. II 1978) [emphasis added].

[15]5 U.S.C. § 7122(d) (Supp. II 1978) declares arbitral awards final and binding on the parties where no exception to the arbitrator's award is filed within 30 days from the date of such award.

[16]Sec. Council of Prison Locals, AFGE v. Howlett, No. 81-1782 (D.D.C. Apr. 28, 1983). Although this case involved a decision by the Federal Services Impasse Panel (FSIP) regarding interest arbitration, it seems to be judicial authority for refusal to comply with an arbitral award in order to gain review of that award under unfair labor practice procedures.

[17]Carter v. Kurzejeski, No. 82-1630 (8th Cir. May 5, 1983).

[18]29 U.S.C. § 151 (1976).

[19]5 U.S.C. § 7121(e)(1) (Supp. II 1978).

United States that such an order (here reinstatement) has been issued and that any employee not complying with that order shall not be entitled to receive payment for so long as the noncompliance continues.[20] The above statutory power to enforce orders does not extend to an arbitrator, even where the arbitrator stands in the place of the MSPB.[21] Therefore, just as the employee and the union are powerless to enforce the arbitral award, so is the arbitrator.

The only alternative open to the union or employee to enforce the reinstatement award is to file an unfair labor practice charge. As noted above, the union or employee can file such a charge if the agency does not request OPM intervention in the matter prior to the expiration of thirty days from the date of the award. However, an unfair labor practice complaint based on bad faith noncompliance under 5 U.S.C. § 7122(b) may not result in reinstatement of the employee. The FLRA may deem that the agency's action did not violate section 7122(b), *i.e.*, failure to comply with an arbitral award where no exceptions are taken, because section 7122(a) specially excludes matters "described in § 7121(f) of this title."

The only current, statutorily accepted method of enforcing an arbitrator's award under 5 U.S.C. § 7121(e), (f) in the face of noncompliance by the agency is to file an unfair labor practice charge with the General Counsel of the FLRA within six months of the date of the award,[22] stating as a basis therefor the agency's noncompliance with the award and alleging a violation of 5 U.S.C. § 7116(a)(8), *i.e.*, failure or refusal to comply with any provision of 5 U.S.C., chapter 71. The specific sections of the chapter involved in the violation would be 5 U.S.C. § 7122(b), discussing actions required by an arbitrator's final award, and 5 U.S.C. § 7121(b)(3)(C), describing the grievance procedure subject to binding arbitration. This indirect procedure, although the only method of gaining enforcement, is subject to the discretion of the FLRA General Counsel who may elect not to issue a complaint if it is felt that the charge fails to state an unfair labor practice.[23]

Once having filed the complaint, the General Counsel will request relief from the FLRA. The agency, in turn, may now be able to defend its action of noncompliance before the FLRA. Again, however, it is presently uncertain whether the arbitration award itself is subject to challenge in the unfair labor practice proceeding before the FLRA. If, after a hearing, the FLRA decides that the preponderance of the evidence received demonstrates that the agency is engaged in an unfair labor practice by refusing to comply with the arbitral award, it may issue an order requiring the agency to cease and desist from such conduct and, further, may require reinstatement of the employee with back pay and attorneys' fees.[24] If the agency continues to noncomply, the FLRA may use its power under 5 U.S.C. § 7123(b) to enforce its decision by petitioning the Federal Circuit Court of Appeals for an enforcement order. The agency may concurrently petition that same court for judicial review of the FLRA's decision.[25] In the action before the court, either in response to the FLRA's petition for enforcement or as the basis for its own request for judicial review, the agency would put forward the same defense it had to the arbitrator's initial award. This procedure, from the agency's view, would provide judicial review of the arbitral award for all parties, i.e., the union, the employee, the agency under section 7123(a), and the FLRA under section 7123(b). This indirect method of enforcing or defending against the arbitral award under the Act is, however, an insidious circumvolution. This marginally acceptable procedure is especially offensive in light of one of the goals of the Act:

> The lengthy and complex appeals processes [of pre-Act law] adversely affect employees and managers alike. The procedures are so confusing they often discour-

---

[20] 5 U.S.C. § 1205(d)(2) (Supp. II 1978).

[21] The 5 U.S.C. § 7121 provisions placing the arbitrator in the place of the MSPB are specifically and expressly limited to 5 U.S.C. § 7703, judicial review, and do not include enforcement procedures under 5 U.S.C. § 1205.

[22] 5 U.S.C. § 7118(a)(4)(A) (Supp. II 1978).

[23] *Id.* § 7118(a)(1).

[24] *Id.* § 7118(a)(7).

[25] 5 U.S.C. § 7123(a) (Supp. II 1978).

> age the proper exercise of employee rights... S2640 will accelerate the personnel action process while protecting employee's rights to fair treatment... S2640 will streamline the appeals process, eliminating unnecessary layers of appeal.[26]

The report went on to state: "As an alternative to the appeals process the bill provides for bargaining units to establish arbitration procedures for the handling of adverse actions."[27]

This authority for establishing alternative arbitration procedures does not seem to have been well thought out when viewed in light of the above discussion. Arbitration procedures for handling adverse actions did not have the same amount of experiential data that other sections of the Act had as a result of the operation of federal labor management relations under Executive Order No. 11,491.[28] Arbitration of adverse actions was the single substantive departure by title VII of the Act from Executive Order No. 11,491.[29] The resulting lack of interface between an arbitrator's award and a decision by the MSPB harms all parties, reduces efficiency and economy, and stands at odds with the overall purposes of the Civil Service Reform Act of 1978. On the one hand, it denies an employee a timely remedy for removal: on the other hand, the agency may be forced to commit an unfair labor practice to obtain review of the award. Additionally, from the viewpoint of the union and the employee, the current scheme allows an agency to obtain judicial review of a decision in spite of OPM's decision not to request reconsideration. Under MSPB appellate procedures, this would be impossible.

Even though this process may take years to run its course, the employee will be protected, in the final analysis, by reinstatement, back pay and in the proper circumstances, attorneys' fees. Regardless of the final outcome, however, this circuitous procedure is not consistent with the purposes and goals of the Civil Service Reform Act of 1978. Further congressional action is necessary to truly promote consistent resolution of these issues and to discourage forum shopping. A legislative solution to this problem would be equate the arbitrator's role to the role of the presiding official, rather than to the role of the MSPB. This modification could then allow exceptions to be brought before the MSPB by any party to the action consistent with the present statutory MSPB appeals procedure. A more swift, definitive, and enforceable decision could then be expected from an administrative agency charged with the responsibility for taking final action in such matters.[30]

---

[26] S. Rep. No. 969, 95th Cong., 2d Sess. 9-10 (1978). This report accompanied S.2640, 95th Cong., 2d Sess. (1978), which became, with modifications, the Civil Service Reform Act of 1978.

[27] *Id.*

[28] Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Compilation).

[29] 124. Cong. Rec. S14270 (daily ed. Aug. 24, 1978).

[30] 5 U.S.C. § 1205(a)(1) (Supp. II 1978).

The Korean Armistice: Collective Security in Suspense

Mr. Samuel Pollack
Special Assistant, OSJA, Eighth United States Army/Korea

Introduction

The first and only genuine, powerful, collective security enforcement Army established under the aegis of the United Nations Security Council - the United Nations Command (UNC) - now well into its fourth decade of existence in Korea, is carrying on its functions under the longest, most violated military armistice in modern history. The UNC and the Korean Armistice Agreement (Armistice)[1] are outgrowths of the major, but undeclared, war[2] which devastated the Korean Peninsula in the early 1950s. While the Armistice succeeded in its immediate aim of terminating, or more accurately "suspending", the Korean hostilities, it has utterly failed to achieve a final, lasting peace, the goal of all such military agreements.

When the Armistice was signed on July 25, 1953 at Panmunjom, a small village about thirty miles north of the capital city of Seoul, its terms stated that a political conference would meet within three months in order to resolve the issues of the war, and reach a final peace accord.[3] Events proved otherwise. The Geneva Conference of 1954 was not only tardy but it adjourned without any agreement on the Korea question.[4] The passage of more than thirty years has done little to relieve the political and military impasse on the Peninsula. Indeed, the Armistice has been violated so many thousands of times[5] that is has become a sort of symbol of the global cold war. In the southern half of the divided Peninsula, the people of the Republic of Korea (ROK), always somewhat restive with the assumption that the state of half-war and half-peace was better than resuming hostilities, have reeled from the shock and a sense of frustration caused by two recent events: the downing of a KAL civilian airliner on September 1, 1983 by a Soviet warplane with a loss of 269 innocent lives, and the terrorist attack on October 9, 1983 against a number of high ROK officials visiting Rangoon, Burma, in a plot instigated by North Korean agents, which resulted in the death of four government cabinet members and others.[6]

While the ROK, the Armistice and the UNC endure under these unenviable stresses and distinctions, the administrative formalities of the

---

[1]Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, 27 July 1953, 4 U.S.T. 234, T.I.A.S. No. 2782, *reprinted in* U.S. Dep't of Army, Pamphlet No. 27-1, Treaties Governing Land Warfare, Appendix B (Dec. 1956) [hereinafter cited as Armistice].

[2]Action by UNC forces in Korea was never officially considered war in the traditional sense; rather it was treated by the US Government as an enforcement of the principles of the UN Charter. That the conflict was a war in the factual sense seems indisputable. *See* Stone, Legal Controls of International Conflict 304-05 (1954); Bishop, International Law, Cases and Materials 949 (3d ed. 1971).

[3]Article 60 of the Armistice states in part that "within three (3) months...a political conference...be held...to settle through negotiation the question of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean questions, etc."

[4]The Geneva Conference convened on April 26, 1954 and dissolved, *sine die*, June 15, 1954. The delay in convening was caused by North Korean and Chinese insistence that the Soviet Union and India should participate as "neutrals". *See* The Korean Problem at the Geneva Conference, Dep't of State Pub. 5609, p. iii (1954).

[5]Statistics kept by the UNC in Seoul indicate that, as of mid-1983, the North Korean side has charged the UNC with no less than 318,000 violations, while the UNC has accused the north with 73,000 contraventions.

[6]While the KAL incident involving the Soviet Union is clearly an incident of the global cold war, the Burma bombing raises the interesting question of whether the Armistice was violated by the North Korean plot, carried out as it was in a third country. The Armistice proscribes the commission of hostile acts "in Korea." The evidence uncovered by the proceedings under way in Burma shows that the plot was hatched *in* North Korea. Accordingly, it can be concluded that an Armistice violation did occur, based partly on the so-called passive personality theory (Case of the S.S. Lotus, P.C. 1, J. Serial A, No. 10 (1927)) and partly on the principle of responsibility of a state for acts of its agents (Schwarzenberger, International Law 236 (1962)).

Armistice continue to be punctiliously observed at periodic meetings of the Military Armistice Commission (MAC), the joint agency established to carry out its provisions. Well over four hundred MAC meetings have taken place at Panmunjom, all in a cold and hostile atmosphere, and some have even been punctuated by physical violence against UNC personnel. At these gatherings, ten officers, five from the UNC on one side, and four from North Korea and one from China on the other, sit facing each other at a long table bisected longitudinally by a line that is, quite literally, a part of the present border between the two Korean states. By design, the table sits astride the Military Demarcation Line (MDL) which the Armistice drew across the entire Korean Peninsula, together with a four-kilometer wide Demilitarized Zone (DMZ) designed to keep the two Korean states completely apart during the armistice period. The DMZ itself has been placed by the Armistice under the control of the former belligerents.

Both the MDL and DMZ are not far from the 38th Parallel, the original 1945 militarily-drawn division of the Korean state which the North Korean army crossed during its unlawful invasion in June 1950. Thus, from a territorial view, it would seem that the bloodshed and tragedy of the Korean War has had no recognizable results.

Background

Extending from the great Asian landmass, the Korean Peninsula is a strategic and important area where vital interests of Japan, the USSR, China, and the United States converge. At the beginning of this century, the Koreans came under Japanese domination which continued throughout World War II. The expectation was that the Allied victory would liberate and again make Korea "free and independent" as promised at Cairo and at Potsdam.[7] The most urgent problem for the United States in 1945 was the surrender of the Japanese armed forces occupying Korea at war's end. With the nearest American troops in Okinawa and Soviet forces already in North Korea, the United States proposed that the 38th Parallel, which divides the Korean Peninsula at its middle, be the line north of which the Japanese would surrender to the Soviets, and south of which they would surrender to the Americans. This was to be a "temporary" military arrangement and it was incorporated into the first General Order issued by General MacArthur, Supreme Commander for the Allied Powers, on September 2, 1945.[8]

It soon became evident, however, that the 38th Parallel was being used by the Soviets to create a political and economic separation of the two zones. United States local officials in the southern portion made unsuccessful efforts at the local level to change Soviet policy. An attempt at the 1945 Four Power Moscow Foreign Ministers Conference also ended in failure.[9] In 1947, the United States submitted the question of Korea to the United Nations (UN) General Assembly and a temporary commission was established to supervise elections, draft a constitution, and otherwise arrange for a representative Korean government.[10] The Soviets refused to recognize UN jurisdiction and would not permit the temporary commission representatives to enter Soviet-controlled territory in the north. Consequently, elections were held, but only in the south and these resulted in the formation in 1948 of the Government of the Republic of Korea (ROK).[11] In October of that year, the UN General Assembly made a finding that the ROK was the only lawfully elected government

[7]Statement of the Cairo Conference in November, 1943, issued by President Roosevelt, Prime Minister Churchill, and General Chiang Kai-Shek, 6 Documents on American Foreign Relations 232, 233 (1944-1945), *reprinted in* 38 Am. J. Int'l L. Supp 8, 9 (1944). For a discussion of the Potsdam Report, *see* 3 U.S. Dep't of State Bulletin 37 (1945).

[8]Japanese Government, Documents Concerning the Allied Occupation and Control of Japan, Vol. 1: Basic Documents, at 33.

[9]The Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom at Moscow on December 27, 1945, established a joint committee of representatives from the US, UK, USSR and China to arrange for a Korean democratic government. Report, 20 U.N.T.S. 259, 284.

[10]G.A. Res. 112 (II), 1947, General Assembly Official Records: Second Session, 16 Sep.-29 Nov. 1947, Resolutions, at 16-18.

[11]Yearbook of the United Nations 1947-48, at 282-84.

on the Korean Peninsula.[12] The government of the so-called Korean People's Democratic Republic was established in 1948 in the north, but it has been recognized only by the Soviets and other communist nations.[13]

With the departure of United States troops in 1947, the situation became increasingly volatile, with constant skirmishes across the artificial border. Adding fuel to the potential fire, Secretary of State Dean Acheson made two speeches in 1950 in which he clearly excluded Korea from the "defense perimeter" of the United States.[14] These statements undoubtedly led the North Koreans and Soviets to think that the United States would not intervene in an attack on ROK territory.

In the early morning hours of June 25, 1950, the North Korean armed forces launched a massive attack on the ROK. Meeting in emergency session that same day and aided by the fortuitous absence of the Soviet representative[15] - the Security Council called on North Korea to cease hostilities and on the member states to render assistance.[16] A second resolution to the same effect was issued on June 27.[17] On July 7, 1950 - a significant day in international law - the Council formally recommended to all member states that armed forces be provided to an international command under the leadership of the United States to repel the aggression and to restore peace and security in Korea.[18] Sixteen UN member states, including the United States, eventually sent armed forces contingents to form the UNC.[19] The sanguinary struggle which raged on the Korean Peninsula is now part of the history of this turbulent century. The invaders were eventually forced back to the Yalu River, the northern border with China, but Chinese intercession into the war eventually caused the belligerents, bloodied and weary, to halt hostilities and commence armistice negotiations near the village of Panmunjom.

---

[12]G.A. Res. 195 (III), 1942, General Assembly Official Records: Third Session, Part I, Resolutions, at 25-27. *See also* 19 U.S. Dep't of State Bulletin 760 (1948).

[13]Survey of International Affairs, 1947-48, at 323.

[14]22 U.S. Dep't of State Bulletin 116, 407 (1950); 23 U.S. Dep't of State Bulletin 12, 13 (1950). *See also* Hoyt, *The United States Reaction to the Korean Attack*, 55 Am. J. Int'l L. 45, 45-48 (1961).

[15]The Security Council was able to act as it did only because the Soviet representative boycotted the Council's meetings in protest against the majority's refusal to seat the representative of the Peoples Republic of China and was therefore unable to veto the Council's action. *See* Hoyt, *supra* note 14.

[16]U.N. Doc. S/1501 (1950).

[17]U.N. Doc. S/INF/4, at 6 (1959).

[18]*Id.* In view of its significance in this article, the complete text of this third UNSC resolution is reprinted:

Resolution of the UN Security Council Calling for the Establishment of a Unified Command for UN Forces in Korea, July 7, 1950.

The Security Council:

Having determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace;

Having recommended that members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area;

1. Welcomes the prompt and vigorous support which governments and peoples of the United Nations have given to its Resolutions of 25 and 27 June 1950 to assist the Republic of Korea in defending itself against armed attack and thus to restore international peace and security in the area;

2. Notes that members of the United Nations have transmitted to the United Nations offers of assistance for the Republic of Korea;

3. Recommends that all members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States;

4. Requests the United States to designate the commander of such forces;

5. Authorizes the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating;

6. Requests the United States to provide the Security Council with reports as appropriate on the course of action taken under the Unified command.

[19]The contributing member states were Australia, Belgium, Canada, Columbia, Ethiopia, France, Greece, Luxembourg, the Netherlands, New Zealand, the Phillipines, Thailand, Turkey, the United Kingdom, and the United States. The ROK armed forces were also placed under UNC command but have never been officially part of the UNC. For an interesting account of this episode in its opening stages, *see* Hoyt, *supra* note 14, at 52-53.

The United Nations Command

The victorious nations which gathered after World War II in San Francisco were guided by the vision of a new type of world organization, one that would proscribe the threat or use of force in international relations, indeed outlaw the very concept of war itself, except under very limited conditions involving self defense. The Charter of the United Nations (Charter) was directed at that ancient defect in the Law of Nations: its inability to enforce its norms collectively, a defect which logically had required acceptance of the war concept as an instrument to protect a state's existence and its vital interests. This new and fundamental principle was to be the special responsibility of the Security Council and the theory underlying the entire scheme was, in essence, that the world's peace-loving states would protect peace, not as a matter of their self-interest or self-defense but, basically, on behalf of the newborn principle of collective security. As the Charter stated it, effective collective measures for the suppression of acts of agression would effectively eliminate the scourge of war from the world.[20] Chapter VII of the Charter contained specific plans for action by the Security Council, as a sort of world policeman, to maintain or to restore international peace and security, by the use of armed forces if necessary.

The visions of 1945 have not materialized. Wars are still a recurring feature of the world's scene. Universal peace and security are still unattained goals. In 1950, however, the Charter principles seemed more readily attainable than today. In that context, the Korean attack was seen as the gravest threat against the primary purposes and authority of the United Nations. John Foster Dulles, the United States representative to the 1954 Conference, stated this cogently at the Geneva meeting:

> It is important that we should constantly have in mind that what is here at stake is not merely Korea, important as that is; it is the authority of the United Nations. The United Nations assumed primary responsibility for establishing Korea as a free and independent nation. It helped to create the Republic of Korea and nurtured it. When aggressors threatened the Republic of Korea with extinction, it was the United Nations which called on its members to go to Korea's defense.
>
> Korea provides the first example in history of a collective security organization in actual operation.[21]

Even today, Dulles' remarks retain the ring of essential truth. The government of the ROK was established, literally, under the legal and political auspices of the United Nations. An armed attack on this government was, therefore, unabashed defiance of the UN itself and of its basic principles against aggression, and the use of force directed at a state that could reasonably be described as the child of the world body.

The question of whether the actions of the Security Council in the Korean case constituted a valid exercise of the powers and functions of the Security Council under the Charter involves interpretation of the provisions of article 39.[22] That article designates the Council as the agency primarily authorized to deal with threats to peace, breaches of peace, and acts of aggression. The issue was whether the North Korean attack constituted an act of aggression by one state against another, or was merely civil strife between the two factions of one state. While the original division of Korea was intended to be nonpolitical and military, the subsequent actions of the Soviets in dealing with their part effectively served to refute their position that, in 1950, there was only one state on the Peninsula and that the attack was merely an action to reunify the country. Indeed, from an

---

[20]Paragraph 1, article 1 of chapter I of the Charter states in part that one of the purposes of the United Nations is "to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression."

[21]The Korean Problem at the Geneva Conference, U.S. Dep't of State Publication 5609 at 26 (1954).

[22]U.N. Charter art. 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

objective view, it was very clear that by 1950 there were two states, each with its own government, army, laws, constitution, territory, and philosophy of government - the legal indicia of separate statehood in Korea. The unsuccessful efforts of the United States and the United Nations prior to 1950 to treat the divided country as one served but to corroborate this fact as well as the legality of the UNC's actions in the war. Moreover, an adequate legal basis existed to authorize the Council's action in the crisis as a threat to world peace even apart from the question of civil war; the Council recognized this by clearly characterizing the North Korean attack in each of the three resolutions of 1950 as a breach of peace.

Once a legal basis is established for Council action under article 39, article 41 of the Charter encourages the use of measures short of armed force to resolve a crisis. When these are deemed inadequate, article 42 authorizes the Council "to take action by air, sea, or land forces as may be necessary" to restore peace.[23] Article 43 provides a practical means of enforcement by asking the UN member states to contribute to an international armed force for use in those cases requiring military action under articles 39 and 42.[24] This, for perhaps the first time in history, seemed to furnish the world body with a more effective means of enforcing its orders than had been the case with such previous international efforts as the Covenant of the League of Nations and the Kellog-Briand Pact, all of which had proven ineffectual.[25]

However, as has been quite generally recognized, the enforcement system established by chapter VII of the Charter, like other important aspects of that document, has fallen victim to the cold war between the major power blocs. This failure is the direct result of the exercise of the veto power by the Soviet Union as a permanent member of the Council. In addition, the members have not supplied the Council with the forces called for by article 43. For these reasons, the Security Council has been generally unable to utilize its power under articles 39 and 42 to punish aggression in the manner designed. The various pacts of collective self-defense entered into as regional arrangements and exemplified in the free world by the North Atlantic Treaty have tried to fill the gap. Another solution attempted by transferring the powers under articles 39 and 42 away from the Security Council, where they legally belong, over to the General Assembly in the so-called "Uniting for Peace Resolution" of 1950,[26] was less successful, and has only placed the problem in the hands of an ineffective, turbulent and politicized legislative body.

The specific problem in June, 1950 was to create an ad hoc armed force that would be equivalent to international armed force that should have been provided under article 42 by member states. The Council chose a circuitous method not foreseen by the Charter. It "recommended" to the member states that they "contribute" their armed forces to a "unified command" under the United States.[27] As the United Kingdom representative to the Council later explained the problem:

> Had the Charter come fully into force and had the agreement provided for in Article 43 of the Charter been concluded, we

---

[23]U.N. Charter art. 42 states;
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[24]U.N. Charter art. 43, para. 1 states:
All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

[25]Reisman, *The Enforcement of International Judgments*, 63 Am. J. Int'l L. 1, 1-27 (1969). *See* Kurz, *Sanctions in International Law*, 54 Am. J. Int'l L. 324, 324-29 (1960); Halderman, *Legal Basis for United Nations Armed Forces*, 56 Am. J. Int'l L. 971, 971-79 (1962).

[26]*See e.g.*, Kurz, *supra* note 24, at 324, 335-36.

[27]U.N. Doc. S/1501, para. 3 (195). *See supra* note 18.

> would of course, have proceeded differently, and the action to be taken by the Security Council to repel the armed attack would no doubt have been founded on Article 42. As it is, however, the Council can naturally act only under Article 39, which enables the Security Council to recommend what measures should be taken to restore international peace and security. The necessary recommendations were duly made to the resolutions of 25 and 27 June, but in the nature of things they could only be recommendations to individual members of the United Nations. It could not, therefore, be the United Nations or the Security Council which themselves appointed a United Nations commander. All the Security Council can do is to recommend that one of its members should designate the commander of the forces which individual members have now made available.[28]

The procedure followed seems to label the UNC as a product of article 39, rather than article 42. The distinction seems to be rather insubstantial, involving only the difference between a regularly established and an ad hoc entity. In either case, the UNC represents the exercise of Security Council power in its most important functional area: the maintenance of peace and the punishment of aggression. The validity of the UNC's claim to be a true agency of the Security Council and of the United Nations has been well supported.[29] In addition to its military function, the UNC has acted as a minor but bona fide member of the international community by entering into international agreements with sovereign states;[30] by flying the UN flag; by reporting its activities to the Security Council; by securing the approval of its activities by the UN:[31] and by generally acting as an international entity in other ways.

The UNC is no longer the powerful army it once was. Most of its non-US contingents have long since been withdrawn and it is now reduced to a bare nucleus of its former self. A small number of US personnel together with a few representatives from a half dozen UN member states remain in the ROK and perform the function of supervising the Armistice and confronting the North Koreans periodically in Panmunjom. However, the UN flag which flies over major military installations offers its symbolic deterrence to further aggression in Korea. Perhaps its most significant contribution is the legal basis it presents for future reinforcement by United Nations member states should ROK territory again be attacked. Indeed, participation by the UNC in fighting aggression on the Korean Peninsula, from both a legal and strategic view, would seem to a *sine qua non* in view of the obvious military desirability of Japanese territory as a possible staging and logistics base for any credible defense of Korea. In this connection, Japan is committed to support United Nations actions in the Far East,[32] but has never obligated itself to equivalent cooperation in the defense of the ROK under the US-ROK Mutual Defense Treaty, which is after all, but another regional defense pact.[33]

As mentioned above, the creation of the UNC was directly assisted by the fortuitous tempor-

---

[28]U.N. Doc. S/PU 476 (1950). *See* 13 Whiteman, Digest of International Law 410 (1968).

[29]*See* Halderman, *supra* note 24, at 975.

[30]The UNC has entered into two such agreements: one with the ROK on its rights and immunities (Agreement on economic coordination between the Republic of Korea and the United States acting as the Unified Command, with exchange of notes and minutes, 3 U.S.T. 4420, T.I.A.S. No. 2593) and another with Japan (Agreement regarding the status of the United Nations forces in Japan, with agreed official minutes, 5 U.S.T. 1123, T.I.A.S. No. 1995).

[31]UN support was evidenced by a UNGA Resolution of February 1, 1951, 5 U.N. GAOR Supp. (No. 20A) at 1, U.N. Doc. A/1775/Add (1959); 10 U.N. Bulletin 151 (1951). *See* Bishop, *supra* note 2, at 252.

[32]In the preamble to the UNC agreement with the government of Japan mentioned in *supra* note 30, the Japanese government commits itself to "permit and facilitate" support to forces engaged in any UN action in the Far East, no such commitment exists in any US-Japan agreement. Indeed, in an exchange of notes between the US and Japan, dated January 19, 1960, it was specifically stated that any use of facilities and areas in Japan as bases for military operations in other countries requires "prior consultation." T.I.A.S. 4511.

[33]5 U.S.T. 2368, T.I.A.S. No. 3096. This treaty is a binational collective defense pact, to which Japan owes no legal obligation.

[34]*See supra* note 15.

ary absence of the Soviet representative from the Security Council.[34] Having forfeited the chance to veto the UNC initially, the Soviets must now view the UNC's continued existence, safeguarded by the United States' vote in the council.[35] The General Assembly cannot take action under the Charter to nullify any actions regarding the UNC by the Security Council which were in accord with its primary role and function.[36]

It is also quite interesting to note that the legal status of the UNC is the ROK is quite unique and distinguishable from all international military commands present in foreign countries pursuant to regional defense pacts. Unlike them, the UNC is not dependent on consent or agreement by the local state to be stationed on the foreign territory. Such consent, a necessity when derived from a mutual defense treaty, is not needed legally if a force is present based on Security Council resolutions; rights flowing from decisions of the Security Council are mandatory upon individual states.[37] Of course, the ROK's consent to the presence of the UNC has never been in question; nevertheless, the independence of the UNC from the consent of the local state is of significant interest.

As the sole free world signatory to the Armistice, the UNC's existence is also essential, in a practical sense, to avoid additional problems with North Korea at the conference table at Panmunjom. There are no provisions made in the Armistice to provide for a successor organization, although provisions have been made for the Agreement to be binding on each successive UNC Commander-in-Chief. It is quite problematic that the North Koreans would be willing to accept either the US or the ROK as a successor to the UNC.[38]

The Korean Armistice Agreement

Traditional rules of international law hold that an armistice is designed to suspend active hostilities while peace discussions take place between the combatants.[39] The Armistice serves this traditional purpose by calling for suspension of all hostile acts in Korea[40] as a preliminary step to the conclusion of a peace treaty. Also traditionally, the Armistice considers itself as a purely military accord.[41] However, by its very long life and its possibility of some day becoming the basis for a political determination, it would seem to have developed many characteristics of a political document. It has certainly established the present international boundary between the two Korean states.

The Armistice specifies that it will endure until a final accord is reached.[42] This would seem to constitute a waiver of the right accorded by article 40 of the Hague Regulations to denounce the Armistice and resume hostilities should serious violations occur. The actual circumstances in Korea, however, indicate that the North Koreans have not given up their option of resuming hostilities. As mentioned at the outset of this article, the recent KAL plane incident and Burma bombing assassination plot against the ROK President and Government, plus the

---

[35]Article 23 of the Charter makes the US a permanent member of the Security Council. Article 27 generally requires that decisions on substantive matters be made by an affirmative vote of seven members, including the concurring votes of the permanent members. Thus, the veto power of the US as a permanent member could be used should any attempt be made in the Council to nullify the UNC.

[36]In matters which pertain to the maintenance of peace and security, the General Assembly's authority is clearly "residual" while that of the Security Council is "primary", a factor recognized in the "Uniting for Peace Resolution." Res. 377 (V), Nov. 3, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 20, at 10-12, U.N. Doc. A/1775 (1950); *discussed in* 45 Am. J. Int'l L. Supp. 1 (1951).

[37]In article 25 of the Charter, the member states have agreed to "accept and carry out the decisions of the Security Council in accordance with the present Charter", thus, in principle agreeing to make Council decisions mandatory. *See* Report by Secretary-General Hammarskjold, 16 U.N. GAOR Supp. 1A (1961); U.N. Doc. A/4800/Add 1.

[38]It would be possible, of course, for the US or the ROK to succeed to the functions of the UNC under normal rules of succession, but it is questionable whether the North Koreans would accept the succession of either.

[39]Annex to Hague Convention No. IV art 36, *reprinted in* U.S. Dep't of Army, Pamphlet No. 27-1, Treaties Governing Land Warfare, p. 14 (Dec. 1956).

[40]*See supra* note 6.

[41]The preamble states pertinently that the terms and conditions of the agreement are "intended to be purely military in character and to pertain solely to the belligerents in Korea".

[42]U.N. Charter art. 62 states that it remains in effect until "suspended . . . by provision in an appropriate agreement for a peaceful settlement at a political level between both sides."

numerous attempts made to construct tunnels from the north under the DMZ and the hundreds of infiltration attempts into ROK territory, all form an ominous picture of North Korean intentions.[43] Indeed, the situation on the Korean Peninsula, despite some indications of normality, is more consistent with the traditional view that a military armistice, no matter how extended, does not legally terminate a preexisting *de jure* state of war.[44] The North Korean armed forces, over a half-million strong and well prepared for offensive action, constitute a constant real threat to the safety and security of the ROK.

The thousands of alleged violations of the Armistice[45] raise the questions of whether an accord so apparently mutilated can survive as a valid instrument, a question which originally arose in the Middle East where violated armistices have also been a feature of the scene. The principle has evolved that compliance with stipulations of an armistice is conditioned upon equal compliance by the other party. When noncompliance occurs, the other party is given the right to react, but with a limitation on the field within which reciprocity should prevail in order to avoid nullification of the entire armistice by a single infringement. Thus, nonconformance with any clause or provision of an armistice renders the same clause or provision equally nonbinding on the other party, but the rest of the agreement stands.[46]

The UNC's position on North Korean violations has been consistent with the accepted view. In a 1967 report to the Secretary General of the Security Council concerning North Korean violations of the Armistice by the introduction of new weapons, the UNC Representative stated:

> The maintenance of the stability of the situation in Korea requires preservation of the balance in relative effectiveness of the type of materiel in the hands of the two sides. And this is true quite independently of the proposition that violations by the other side are considered to entitle the Unified Command to be relieved of its corresponsing obligations to the extent that will enable it to take appropriate defensive counter-measure.
>
> Accordingly, on 21 June 1957, the United Nations Command announced to the Communist side in the Military Armistice Commission that 'In view of these facts and your gross violations of the provisions of subparagraph 13(d), the United Nations Command considers that it is entitled to be relieved of corresponding obligations under the provisions of this subparagraph until such time as the relative military balance has been restored and your side, by its actions, has demonstrated its willingness to comply.[47]

This UNC position can be supported by the generally, accepted principle of the right of self-defense, as well as by the right of a party to take necessary action to redress the consequences of violations of an agreement.

This general principle has been applied not only to the matter of weapons introduction but to other significant portions of the Armistice dealing with demilitarization of the DMZ area. Recognizing that the number of persons and materiel in the DMZ has increased far beyond the limiting provisions of the Armistice,[48] and that repeated protests concerning North Korean actions in this regard have been disregarded, the UNC has had to place additional armed forces and fortifications into the UNC side of the DMZ in order to neutralize the situation. At a meeting of the Military Armistice Commission on May 21, 1983, for example, Rear

---

[43] 1983 saw a remarkable increase in tension in the ROK resulting from the incidents mentioned in this article and others less well-known.

[44] *See* Levie, *Nature and Scope of the Armistice Agreement*, 50 Am. J. Int'l L. 880, 885 (1956).

[45] *See supra* note 5.

[46] *See* Report of the United Nations Secretary to the General Assembly Concerning Problems under the Egyptian-Israeli Armistice, U.N. Doc. S/3569 (1956); Bishop, *supra* note 2, at 209.

[47] 37 U.S. Dep't of State Bulletin 393 (1956); Bishop, *supra* note 2, at 210.

[48] Paragraph 13a of the Armistice requires the commanders of each side to withdraw all their military forces, supplies and equipment from the DMZ, except for one-thousand plus members of authorized agencies.

Admiral Storms, then the UNC chief delegate, referred to this problem and called for a return to a bona fide, general demilitarization of the DMZ: "Encroachment within the Demilitarized Zone has progressed to the extent that heavily armed personnel from the two sides occupy hardened and fortified positions within a few hundred meters of each other. Thus, there is no 4000-meter buffer zone as was intended and directed by the Armistice Agreement."[49]

Although Admiral Storms placed primary blame for these violations on the North Koreans, some criticism of the ROK armed forces seems also to be implied. While the ROK forces are subject to the control of the United States Commander-in-Chief of the UNC and the Combined Forces Command - a recently created US-ROK bilateral command based on the 1954 Mutual Defense Treaty - problems have arisen in the past even though, on the whole, US-ROK cooperation has been signally successful.[50]

The three decades of Armistice experience in Korea seem to warrant some judgment of the value of this battered instrument. It evidently has suspended large scale hostilities but it has certainly not succeeded in achieving the final peace accord that is the ultimate object of all such agreements. It has, undeniably, also been of use to ameliorate the overall situation by providing a site for meetings where animosities, complaints, recriminations, and charges can be aired. One could conclude that, while a cold war continues on the Korean Peninsula, even a tattered Armistice is preferable to its only alternative, war, under the existing circumstances.

Panmunjom

For many years, a "joint security area", a circle about 800 meters in diameter, surrounded the building at Panmunjom where personnel of the UNC and the North Korean Forces could, with minor restrictions, walk about freely.[51] On August 18, 1976, a group of North Korean soldiers attacked a work party of UNC personnel while they were engaged in trimming a tree in the joint security area. The attack resulted in the death of two American army officers and the wounding of several other personnel. In response to this brutal and unprovoked attack, a substantial number of US military aircraft and a carrier task force group proceeded to the Straits of Korea to increase the firepower capabilities of US forces deployed in the ROK. This incident is still a vivid warning to all personnel in Korea to guard against undue confidence or carelessness in the DMZ area.

As a result of this incident, the joint security area is no longer a free movement zone for both sides. The area has been divided into northern and southern sectors like the rest of the DMZ. Entry of military personnel to the other side's sector of the joint security area is forbiden.[52] This minor division of territory in the joint security area represents the only significant development in the area dispositions effected by the Armistice. In all other respects, the legal and strategic situation in the DMZ and even on the Korean Peninsula has remained substantially unchanged from that at the termination of the war. A Rip Van Winkle awakening today in the DMZ area would see that the weapons were more modern, the combatants facing each other just as belligerently, and the cold war continuing just as ever.

Conclusion

Since its inception in 1945, the United Nations has established fifteen armed forces units for the purpose of maintaining or restoring international peace and security in troubled areas of the world.[53] With the exception of the UNC in Korea, all these units have been involved in "peace keeping" missions, such as patrolling border zones and maintaining the separation of forces. The creation by the world body of a powerful international army with the mission of repelling and defeating a flagrant aggression, and the subsequent action of the

---

[49]Stars and Stripes, Pacific edition, May 23, 1983, at 1, 5.

[50]In some cases, the Commander-in-Chief, UNC, was not advised or consulted when elements of the ROK armed forces were moved about during periods of tension.

[51]Pursuant to an agreement made at the 25th MAC meeting, dated July 27, 1953.

[52]Agreement to supplement the agreement mentioned above, dated September 6, 1976.

[53]*See* I-IV Higgins, United Nations Peacekeeping, Documents and Commentary (Royal Institute of International Affairs, Oxford University Press).

UNC in fighting a sanguinary major war in order to accomplish its assigned law enforcement duties, is in all essential respects equivalent to the exercise of a state's police power in punishing violations of an internal criminal code.

On July 27, 1953, when the Armistice was signed by general officers in a tent in Panmunjom, a grander, more formal, ceremony took place in Washington, D.C., where diplomatic representatives of all sixteen UNC member states signed a Declaration of Policy in Support of the Korean Armistice. That Declaration still seems relevant to the political and strategic Korean problem:

> The task ahead is not an easy one. We will support the efforts of the United Nations to bring about an equitable settlement in Korea based on the principles which have long been established by the United Nations, and which call for a united, independent and democratic Korea. We will support the United Nations in its efforts to assist the people of Korea in repairing the ravages of war.
>
> We declare again our faith in the principles and purposes of the United Nations, our consciousness of our continuing responsibilities in Korea, and our determination of good faith to seek a settlement of the Korean problem. We affirm, in the interests of world peace, that if there is a renewal of the armed attack, challenging again the principles of the United Nations, we should again be reunited and prompt to resist. The consequences of such a breach of the armistice would be so grave that, in all probability, it would not be possible to confine hostilities within the frontiers of Korea.[54]

The faith and ideals of 1953 which are reflected in the above quotation may be battered and worn by the events of the past three decades; the Armistice is also. However, even reduced to a vestige of its former powerful self, the UNC is both an enforcement agency and a symbol to remind the world of the only time in recent history when a powerful army fought to defeat an aggressor, not in self-defense, but in the name of and under the banner of the UN Charter and the principle of collective security. A unique pair of phenomena, the UNC and the Armistice, thus remain on the Korean Peninsula as two relics from the past, but at the same time they may be precursors for a more effective system of international law for the future. So long as they stand facing a belligerent enemy state, persisting in their mission, and flying the UN flag, it can be said that the ideal of collective security is not dead, only suspended, on the Korean Peninsula.

---

[54] 4 U.S.T. 230, T.I.A.S. No. 2781.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

HQDA/DAJA-LC Message 221300Z Dec 83 provided guidance on two subject areas:

1. **Adverse Actions Against Civilian Employees Based on Denial or Revocation of Security Clearance.** The Merit Systems Protection Board (MSPB) intends to apply the standards established in *Hoska v. Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982), to cases concerning adverse actions based on security clearance denials or revocations. The agency must demonstrate to the MSPB, by a preponderance of the evidence, that there is a rational nexus between the denial or revocation of the security clearance and the conduct or other evidence relied upon by the agency to deny or revoke the clearance. In determining whether the

adverse action is taken for such cause as will promote the efficiency of the service, the MSPB will make its own determination concerning the propriety of the denial or revocation of the security clearance. Labor counselors should advise DAJA-LC immediately of any MSPB cases involving security clearances.

2. **Prohibition Against Endorsement of Private Organizations.** Army policy is to maintain an "arms length" relationship between the Army and private organizations such as professional, civil, ethnic, patriotic, and youth groups. Endorsements by DA officials of such private groups are inconsistent with an "arms length" relationship even though such groups may share the Army's goals.

HQDA/DAJA-LC Message 021510Z Jan 84 reads as follows:

SUBJECT: Labor Counselor Bulletin Item

1. Army has not been represented by counsel in some EEOC hearings because some EEO officers have frequently secured the appointment of non-lawyers to be the designated agency representative. The new AR 27-1, awaiting printing by TAG, provides that labor counselors act as management representatives before the EEOC, among others. (See Labor Counselor Bulletin No. 10, 1 May 1983, page 4.)

2. Commanders should direct their EEO officers to go immediately to the supporting legal office for the designation of the labor counselor as agency representative as soon as they (1) learn that the complainant has requested an EEOC hearing or (2) a notice of hearing has been served on the command EEO officer or other designated official.

3. If the case has been transferred to you from another commander's jurisdiction for an EEOC hearing, the local labor counselor will become the designated agency representative vice the former or as co-representative. The agency must not be unrepresented and any action deemed necessary to perfect such representation must be taken.

Automation Developments

US Army Legal Services Agency

Tripartite Information Systems Planning Study Commissioned

To further the Department of Defense goal to develop military justice integrated information systems which are responsive to user needs and simultaneously eliminate major information voids, redundancies, and duplicative expenditure of resources, a joint functional Information Systems Planning (ISP) study was commissioned on 19 January 1984 by the commanders of the US Army Criminal Investigation Command, the US Army Legal Services Agency (as executive agent for The Judge Advocate General), and the US Army Military Police Operations Agency.

The scope of this ISP study covers all facets of the administration of military discipline, justice, and corrections as required by statute, Executive Orders, court decisions, and both Department of Defense directives and Department of the Army regulations from the installation level, CONUS and non-CONUS, to HQDA. A major component of the study will be a field survey. Twenty-five representative commands and installations worldwide have been selected to participate in the study and will each receive ten questionnaires for completion by local law enforcement, legal, and corrections managers. At least one unit or battallion level commander

at each installation or command will also be asked to provide input.

COL Rex Brookshire, JAGC, has been designated as Team Leader for the project and other study team members are being provided by each of the agencies concerned. Based on the information supplied by executive and managerial personnel in the Washington area and the survey responses from the field, an integrated information architecture will be developed that identifies all law enforcement, legal, and corrections information requirements, to include system processes, data classes, and data elements. This will be done in modular form so that each module and its subsets will be severable to respond to each user's requirements. The system design will feature, wherever possible, a one-time key stroke capture of justice-related information which will be readily available not only to local and regional executives and managers but also for DA, DOD, Congressional, and Presidential use.

This project is of great significance to the entire Corps. The ISP will provide a major blueprint which will guide future automation efforts at all administrative levels related to the military criminal justice system, and which will serve as a basis for systems design, networking, and even procurement of hardware and software. Staff judge advocates, military judges, and trial and defense counsel who receive questionnaires during the field survey stage of the study and who are later asked to evaluate and provide comment to the ISP once it is drafted should carefully consider their responses. This input, and that provided by law enforcement and corrections officials, is absolutely critical to the accuracy and validity of the study effort and the information systems plan which it will produce.

It is uncertain how much time will be required for a careful field evaluation of the draft plan, but even allowing two months for such an examination, it is currently estimated that the study will be completed and the plan finalized and distributed to the field in early June 1984.

Criminal Law Section

Criminal Law Division, OTJAG

Lawyer-Client Communication

In a recent court-martial case examined by The Judge Advocate General pursuant to Article 69, UCMJ, a judge advocate serving in the administrative law section of a staff judge advocate office advised a senior NCO in connection with the NCO's on-post commercial solicitation activities. The NCO was subsequently court-martialed for activities related to the solicitations. At trial, the defense moved to suppress details of the conversation between the accused and the administrative law officer, as privileged under Military Rule of Evidence 502. To avoid litigation of this issue in the future, judge advocates are reminded that they represent individual clients only when detailed or made available to do so, *.e.g.*, as legal assistance officers or defense counsel. Otherwise they may not, without the permission of superiors, undertake the representation of service members or advise clients on personal matters in a manner that could reasonably be construed as an attorney-client relationship. AR 27-1, para. 10 (IC 2, 1 Nov. 1982). Judge advocates who principally render legal services on behalf of the United States must be alert for these possible conflicts, and ensure that when communicating with a soldier seeking personal advice, the soldier is referred to legal assistance, TDS, or another office, as appropriate.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

Regulation

AR 27-3, Legal Assistance, has been published and distributed by The Adjutant General. The regulation is dated 1 March 1984, with an effective date of 1 April 1984.

Statistical Format

A format for keeping statistical data on the operations of a legal assistance office was distributed to all offices. Several questions concerning its use have been received by the Legal Assistance Branch, TJAGSA. These questions included:

(1) What is the reporting period to be covered?
Recommended reporting period is each month.

(2) What about reporting actions by clerical personnel, such as notarization; how are classes to soldiers reported?
The format is primarily intended to keep a record of attorney actions on behalf of an individual client. Other statistics, such as those reflected above, may be kept also and entered under the remarks section.

(3) What is the easiest way to determine the number of "clients" seen each reporting period?
Keeping the client counseling cards for the reporting period separate from the rest of the cards. If all cards used during a particular month are counted at the end of that month, their number will reflect the actual number of clients seen. This will be the case even though some of the clients made multiple visits to the office during reporting period.

(4) The format includes a place for tabulating telephone inquiries. Are these incoming or outgoing?
The format is primarily intended to keep records of attorney actions on behalf of a client. The telephone inquiries referred to are those made by the attorney on behalf of the client. Remember—giving legal advice over the phone in response to a phoned inquiry is discouraged.

(5) When do you want the statistics reported, and to whom?
Paragraph 2-8*b* of AR 27-3 requires a report on the operation of a legal assistance office to be rendered when directed by TJAG. Statistics should be retained in the office files until that direction is received. When TJAG does require the report to be rendered, it will be sent to HQDA (DAJA-LA), WASH DC 20310.

Tax Supplement

The 1984 version of the Legal Assistance Officer's Federal Income Tax Supplement has been distributed. This guide has also been sent to the Defense Technical Information Center to enable individuals or offices to obtain additional copies in either hard copy or microfiche. The DTIC ordering number will be published in *The Army Lawyer* once it becomes available.

The Uniform Martial Property Act

Bills have been introduced in the legislatures of two states which would enact the Uniform Marital Property Act (UMPA), a model act recently promulgated by the National Conference on Uniform State Laws. Indiana and Missouri would become the first two states to pass the UMPA, although a similar bill is pending in Wisconsin and it is expected that the measure will be introduced in several other states.

The UMPA was also expected to be submitted to the American Bar Association for approval at the ABA's winter meeting. The UMPA classifies all spousal property as martial property unless it has been specifically classified otherwise. In essence, the UMPA is a further shift away from the title concept of division of marital property in divorce situations and is a move toward a community property scheme of property distribution. The UMPA recognizes a

"sharing concept", *i.e.*, although one spouse's earnings may be the source of their income and the property they acquire, the efforts and industry of both contribute to whatever property is acquired during the marriage and should be shared accordingly.

State Legislatures Convening in 1984

The legislatures of 43 states and Puerto Rico are scheduled to meet in 1984. Thirty-six convened in January. Three (Alabama, Connecticut, and Wyoming) began in February, while Minnesota convened in March, and Florida and Louisiana are scheduled to meet in April. North Carolina's legislature will convene in June. Seven states (Arkansas, Montana, Nevada, New Hampshire, North Dakota, Oregon, and Texas) are not scheduled to hold a regular legislative session in 1984.

Texas Now Permits Limited Garnishment

In November 1983, Texas voters approved an amendment to the Texas Constitution which authorizes garnishment of wages for the enforcement of court-ordered child support. The change took effect November 29, 1983.

The Texas legislature had previously passed a wage assignment law which permitted a person subject to a support order to voluntarily assign a portion of wages earned to satisfy the support obligation. The law also contained a provision, however, that if the proposed constitutional amendment passed, courts would have the authority to order involuntary wage assignments. Under the wage assignment law, the amount withheld may not exceed one-third of the debtor's disposable earnings.

Illinois Toughens Support Laws

A new Illinois law which took effect January 1, 1984 requires Illinois courts, upon entry of an order for child support or maintenance of a spouse, to enter a separate order for withholding of income. The separate order does not take effect unless the person subject to the order becomes delinquent in paying support or unless the court orders the withholding order to take effect immediately. The order directs the employer of the person subject to the order to withhold from the obligor's pay an amount equal to the amount specified to be paid as child or spousal support plus an additional amount of not less than ten percent of the support amount to be applied toward any arrearage which has accrued.

Garnishment - Military Pay

The Supreme Court has granted certiorari in *United States v. Morton*, an action of interest to legal assistance officers counseling service members concerning involuntary allotments, garnishment, and division of military retired pay. In *Morton*, an Air Force colonel sued in the U.S. Court of Claims to recover from the government amounts he contended were wrongfully paid to his ex-wife pursuant to a writ of garnishment issued by an Alabama court. Colonel Morton, who was an Alaska domiciliary, contended that the Alabama court lacked jurisdiction over him for purposes of entering the underlying alimony and child support order upon which the writ of garnishment was based.

The Court of Claims agreed. The Air Force appealed the case to the U.S. Court of Appeals for the Federal Circuit which, in May 1983, ruled in Colonel Morton's favor. A petition for certiorari was filed December 2, 1983 and granted January 23, 1984 (52 U.S.L.W. 3538 (U.S. Jan. 17, 1984).

The government argues that the Air Force should have been entitled to rely on the provisions of 42 U.S.C. § 659f, which provides for nonliability of the government and disbursing officers who rely on and honor legal process valid on its face. The Air Force contends that the writ of garnishment it honored was facially valid. Colonel Morton argues that he brought the Alabama court's lack of jurisdiction to the attention of the Air Force before the writ was honored and that the government should not therefore be permitted to escape liability. The Court has requested expedited briefs from the parties.

In Memoriam

The Administrative and Civil Law Division, TJAGSA, is saddened to announce the death of Major Seward H. "Skip" French, USAR, who died tragically January 6, 1984 in a plane crash near Idaho Falls, Idaho. Major French was an

Individual Mobilization Augmentee (IMA) who was assigned as an Instructor to the Administrative and Civil Law Division and taught estate planning in the legal assistance area.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Reserve ID Cards

The Judge Advocate General's School does not issue Reserve Component ID cards. A Reserve officer who needs an ID card should follow the procedure outlined below:

1. Fill out DA Form 428 and forward it to Commander, U.S. Army Reserve Components Personnel and Administration Center, ATTN: DARP PSE-VC, 9700 Page Boulevard, St. Louis, Missouri 63132. Include a copy of recent AT orders, promotion orders, recent appointment orders or other documentation indicating that applicant is an actively participating Reservist.

2. RCPAC will verify the information and the individual's entitlement, prepare an ID card, and send it back to the Reservist.

3. The Reservist must sign it, attach an appropriate photograph, and return the materials to RCPAC.

4. RCPAC will affix the authorizing signature and laminate the card, and will send the finished card to the applicant. Also inclosed will be a form receipting for the ID card.

5. Applicant must execute the receipt form and send it to RCPAC.

RC SOLO Courses

For a number of years, The Judge Advocate General's School (TJAGSA) has successfully conducted Senior Official Legal Orientation (SOLO) courses designed to acquaint senior commanders with the legal issues and responsibilities they may encounter as general and special courts-martial convening authorities. SOLO courses, offered several times each year, are one week in duration and focus primarily on criminal and administrative law matters. Because the popularity of these resident courses with active component commanders has prevented Reserve component officers, as a general rule, from attending TJAGSA SOLO training, served U.S. Army Reserve Commands (ARCOM) have developed their own SOLO programs. The results of their initial efforts have been outstanding.

The 88th, 90th and 102d ARCOMs have conducted SOLO courses for their senior commanders and received favorable responses from attendees. These ARCOMs, utilizing organic judge advocate personnel as instructors, have prepared their own instruction with minor assistance from the TJAGSA faculty. While many of the courses offered in the ARCOM SOLO are similar to those contained in the TJAGSA course, the ARCOM SOLOs provide the additional benefit of addressing matters of particular concern to Reservists, such as reemployment rights and the administrative disciplinary alternatives of USAR commanders.

A sample outline for SOLO training follows. The precise format will be based upon local assets and local requirements, and will obviously vary from one command to another. This training should normally be conducted over a weekend, and should include approximately 16 classroom hours.

ARCOM, Military Law Center (MLC) and ARNG staff judge advocates (SJA's) must select and train qualified judge advocates as instructors. Experiences to date have shown this to be no problem as critiques consistently rate the instruction as excellent. SOLO course managers should also keep in mind that some TJAGSA short courses are available in many cases to help prepare Reserve component instructors in their subjects.

Sample Outline

A. Title: Senior Reserve Officers Legal Orientation Course.

B. Purpose: To acquaint senior reserve officers with the legal responsibilities and issues commonly faced by the commanders and staff officers of reserve commands, divisions, brigades and battalions.

C. Prerequisites: Reserve Component commissioned officer in the grade of promotable major through major general assigned or about to be assigned as a commander or principal staff officer of a reserve command, division, brigade or battalion. Security clearance is not required.

D. Length: 16 hours.

E. Training Location: As deemed appropriate by the reserve command sponsoring the training.

F. Subjects:

First Day	Hours
Administrative and Civil Law:	
Judicial Review of Military Activities	
Freedom of Information Act/Privacy Act	
Contract Law and the Commander	
Civilian Personnel/Labor Management Relations	
Reports of Survey and Federal Tort Claims Act	
Line of Duty Determinations	
Elimination Boards	
Reservists Civil Employment and Soldiers and Sailors Civil Relief Act at Mobilization	
Panel Discussion, Question and Answer, Review	
	8

Second Day	Hours
Law of War	
Contract Law and the Commander	
Military Justice and the Reservist	
Function, Capabilities and Relationship of Commander with Military Legal Personnel or "How to use your JAG"	
Panel Discussion, Question & Answer, Review	
	8

The SOLO program has worked extremely well in orienting senior active component commanders, and there is every expectation that similar success may be achieved with the Reserve Component commanders. Staff judge advocates of Reserve Component units should consider the value of SOLO training to their commands in determining whether to institute such a program. One additional item of note for those planning a SOLO course—SOLO training is designed for commanders, and has been most effective when they personally participate. It is critical to the success of this program that deputies or other alter egos not attend as substitutes for the commander although they may benefit by attending with the commander.

Anyone with questions about SOLO may contact one of the ARCOMs which has already conducted a SOLO course, or CPT Thomas McShane of the Reserve Affairs Department, TJAGSA, at 804-293-6121.

Enlisted Update

Sergeant Major Walt Cybart

MCM Training

Due to the pending publication of the revised MCM and the need to provide training to our legal clerks and court reporters concerning this revision, both the Legal Clerk/Court Reporter Refresher Course at Fort Ord, California and the Chief Legal Clerks/Senior Court Reporter Refresher Training Course at Charlottesville, Virginia will focus upon the new MCM. Maximum attendance at these courses is encouraged; the Chief Legal Clerks/Senior Court Reporter Refresher Training Course is by invitation only. These two courses may be the only opportunity for enlisted personnel to obtain DA instruction on the new MCM.

SQT Results

The following average scores for the 1983 SQT reflect a significant drop from last year (an average of 22 points for legal clerks and 27 points for court reporters) suggesting a real need for more attention to detail and intensified training programs:

MOS	1983	1982	+/-
71D10	60.8	88.5	-27.7
71D20	66.8	89.8	-23.1
71D30	72.0	89.6	-17.6
71D40	68.1	89.9	-21.8
71E20	68.7	99.3	-30.6
71E30	73.3	100	-26.7
71E40	75.6	100	-24.4

The entire SQT test for MOS 71D/71E has been reviewed by a group of senior NCOs and several changes were recommended for the 1985 test period. These changes, if approved, will provide improvements in the technical aspects of the test as well as a reduction in the number of non-MOS related questions. The test with recommended changes, in draft form, will be reviewed again at the Chief Legal Clerks/Senior Court Reporter Refresher Training Course by the same panel of senior NCOs who recommended the changes. Results of that review will be published at a later date.

Reclassification

By now, most of the field is aware of the MOS reclassification letters which have been mailed. Let me stress that as of now the program is strictly *Voluntary*. However, in the future it may become a mandatory policy. I support the concept and the program; it will provide some promotion opportunities for those who wish to migrate from the legal field.

CLE NEWS

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop.

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Contract Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training.

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training.

June 18-29: JAOC: Phase IV.

July 9-13: 13th Law Office Management (7A-713A).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-18: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trail Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-24: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference.

October 15-December 14: 105th Basic Course (5-27-C20).

3. Civilian Sponsored CLE Courses

June

1: GICLE, Will Drafting, Atlanta, Ga.

1-2: ABA, Changing Roles in Public Regulation of the Law, New Orleans, LA.

1-2: GICLE, Law Office Management, Atlanta, GA.

2: NJCLE, Handling Witnesses; Effective Summation, Woodbridge, NJ.

3-9: NITA, Trial Advocacy, Philadelphia, PA.

7: NJCLE, Handling Witnesses; Effective Summation, Newark, NJ.

NCDA: 8-15, Executive Prosecutor Course, Houston, TX.

9: CCLE, Coping with Incapacity, Cortez, CO.

9: NKUCCL, Medical Malpractice, Highland Hts., KY.

11-15: UDCL, Government Construction Contracting, Denver, CO.

15-16: KCLE, Agricultural Law, Lexington, KY.

17-22: ALIABA, Estate Planning in Depth, Madison, WI.

18-22: SBT, Advanced Estate Planning & Probate, Dallas, TX.

21-22: GICLE, Medical Program, Atlanta, GA.

22: PBI, Representing Residential Landlords & Tenants, Gettysburg, PA.

24-29: NJC, Family Court Proceedings—Specialty, Reno, NV.

24-29: NJC, Alcohol & Drugs—Specialty, Reno, NV.

24-29: NJC, Judicial Writing in Trial Courts—Specialty, Reno, NV.

24-29: NJC, Admin. Law: Management Problems for Chief Judges & Boards—Specialty, Reno, NV.

24-29: NJC, Admin. Law: High Volume Proceedings—Graduate, Reno, NV.

29-30: GICLE, Admiralty Law Institute, Savannah, GA.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user my be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD BO77550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD BO77551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD BO77552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD BO77553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD BO77554	Criminal Law, Evidence/JAGS-ADC-83-11
AD BO77555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD BO78201	Criminal Law, Index/JAGS-ADC-83-13
AD BO78095	Fiscal Law Deskbook/JAGS- ADK-83-1
AD BO78119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD BO79015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1
AD BO77738	All States Consumer Law Guide/JAGS-ADA-83-1
AD BO77739	All States Will Guide/JAGS-ADA-83-2
AD BO79729	LAO Federal Income Tax Supplement

Those ordering publications are reminded that they are for government use only.

2. Professional Writing Award for 1983

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published

in the *Military Law Review* during the preceding calendar year. The award consists of a written citation signed by The Judge Advocate General and an engraved plaque. The award is designed to acknowledge outstanding legal writing and to encourage others to add to the body of scholarly writing available to the military legal community.

The award for 1983 was presented to Major Charles E. Trant, JAGC, for his article, "The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma," which appeared at 99 Mil. L. Rev. 1 (winter 1983). The article, which was originally submitted in fulfillment of the thesis elective in the 31st Judge Advocate Officer Graduate Course and was selected as the best thesis submitted during that Course, traces the history of the insanity defense, examines the alternatives to it, and asserts that the "guilty but mentally ill" verdict is the option that best protects society while preserving the opportunity for rehabilitation for the accused.

Major Trant is currently assigned to the U.S. Army Trial Judiciary as a special court-martial judge in the Fifth Judicial Circuit in Mannheim, Federal Republic of Germany. He has formerly served at Fort Polk, Louisiana, the Defense Appellate Division, and as a Commissioner for the Army Court of Military Review.

3. Videocassettes

The Television Operations Office of The Judge Advocate General's School announces that the videocassettes listed below are available to the field. Titles, running times, speakers, and synopses are indicated for each program. If you are interested in obtaining copies of any of these programs, please send a *blank 3/4" videocassette of the appropriate length* to: The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-138 Nov 83 38:00	**Procurement Legal Research** Mr. Steven Schooner, Legal Intern, Contract Law Division, TJAGSA, discusses research materials in the contract law field. He illustrates where to locate the research materials and their value as legal tools. He discusses the main sources such as DA Pam 27-153 and the DAR. Secondary sources include other regulations, reporting services, textbooks, newsletters, citators, journals, and computerized services. An example research problem is presented and discussed.
JA-139 Dec 83 56:00	**Nonappropriated Fund (NAF) Contracting for the Air Force** Speaker: Mr. Roy Leonard, Headquarters Air Force Manpower and Personnel Center, Office of the Staff Judge Advocate, NAF Law Division, Randolph Air Force Base, Texas. This videotape discusses the DOD Instructions, and AF Directives and Regulations applicable to NAF contracting in the Air Force. It discusses the types of NAFI funds in the Air Force, the role of legal counsel, the NAFI disputes process and special problem areas associated with Air Force NAF contracting. An outline is available upon request for use with this videotape.
JA-140-1 Jan 84 54:36	**1984 Government Contract Law Symposium (January 1984)** **Contract Law Developments - The Year in Review, Part I** Speakers: Major Paul C. Smith, Senior Instructor, Contract Law Division, TJAGSA, and Major Julius Rothlein, Instructor, Contract Law Division, TJAGSA. A summary of significant developments in contract law in 1983. Issues discussed include warranties, implementation of the Federal Court Improvement Acts, contract costs, and labor standards.
JA-140-2 Jan 84 40:10	**Contract Law Developments - The Year in Review, Part II** A continuation of JA-140-1.
JA-140-3 Jan 84 50:33	**First Cuneo Lecture - An Adversarial Relationship in Government Contracting: Causes and Consequences** Guest Speaker: Mr. John Cavanagh, Vice President and Special Assistant to the President, Lockheed Corporation, Burbank, California. An industry's view of the growing adversarial relationship in government contracting, its causes and consequences.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-140-4 Jan 84 61:45	**DOD and the Legislative Agenda** Guest Speaker: The Honorable Mary Ann Gilleece, Deputy Under Secretary of Defense for Research and Engineering (Acquisition Management), Department of Defense. A discussion of DOD initiatives and legislative actions during 1983. The new Federal Acquisition Regulation (FAR) is discussed.
JA-140-5 Jan 84 43:50	**Federal Officers' Liability for Constitutional Torts, Part I** Guest Speaker: Lieutenant Colonel John S. Miller, III, USAR, Assistant General Counsel, General Services Administration, Washington, D.C. A review of recent development in the law regarding liabilities and immunities of federal officers for constitutional torts.
JA-140-6 Jan 84 20:34	**Federal Officers' Liability for Constitutional Torts, Part II** A continuation of JA-140-5.
JA-140-7 Jan 84 47:37	**Equal Opportunity in Government Contracts** Guest Speaker: Mr. E. Boyd Steele, Chief, Case Analysis Section, OFCCP, Department of Labor, Washington, D.C. A review of current actions and initiatives by the Office of Federal Contract Compliance Programs. Provides guidance on making EEO and affirmative action work in government contracts.
JA-140-8 Jan 84 60:39	**Carlucci Revisited: Current DARCOM Initiatives, Part I** Guest Speaker: Mr. Burton Blair, Command Counsel, DARCOM, Alexandria, Virginia. Year-end review of contract activities in DARCOM and a discussion of policy trends and initiatives for the future.
JA-140-9 Jan 84 12:29	**Carlucci Revisited: Current DARCOM Initiatives, Part II** A continuation of JA-140-8.
JA-140-10 Jan 84 49:00	**State Taxation of Government Contractors** Guest Speaker: Colonel Ronald Cundick, Chief, Contract Law Division, Office of The Judge Advocate General, Department of the Army, Washington, D.C. A review of current actions by states to tax government property being used by government contractors. The impact of such taxation upon the Army budget and upon the Commercial Activities Program is discussed.
JA-140-11 Jan 84 43:26	**Commercial Activities Program - An Update** Guest Speaker: Mr. Sam Hopper, Army Management Division, Office of ASARDA, DA. A year-end review of the Commercial Activities Program. DA implementation of OMB Circular A-76 is discussed.
JA-140-12 Jan 84 46:36	**A Construction Law Update** Guest Speaker: Mr. Geoffrey Keating of Lewis, Mitchell, and Moore, Washington, D.C. A discussion of recent developments in construction contract law including: Prompt Payment Act, specifications, delays, differing site conditions, warranties, and contract administration.
JA-140-13 Jan 84 51:51	**The Corps' Contract Lawyers: What Do They Do?** Guest Speaker: Mr. William L. Robertson, Deputy Chief Counsel, Corps of Engineers, Washington, D.C. A general overview of the organization of the Corps of Engineers, their mission and recent activities.
JA-140-14 Jan 84 55:30	**Contract Fraud Indicators and Civil, Administrative and Contractual Remedies** Guest Speakers: Mr. Howard W. Cox, Deputy Assistant Inspector General for Criminal Investigations Policy, and Mr. Dennis S. Cameron, Project Officer with the DOD Inspector General's Office for Criminal Investigations Policy, Office of the DOD Inspector General, Washington, D.C. An overview of the policies and programs designed to detect and reduce fraud and waste in the federal government. The role of the DOD IG regarding the Fraud, Waste, and Abuse Program.
JA-140-15 Jan 84 49:44	**Recent Developments at Boards of Contract Appeals - A Government View** Guest Speaker: Colonel William P. Rudland, USAF, Chief Trial Attorney, Wright-Patterson AFB, Dayton, Ohio. A presentation of recent trends and significant cases before the ASBCA. The interaction between the agency's contracting officer and the trial attorney is discussed.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-140-16 Jan 84 40:00	**Recent Developments at Boards of Contract Appeals - The Private Bar View** Guest Speaker: Mr. Eldon Crowell of Crowell and Moring, Washington, D.C. The private bar's view of recent significant ASBCA cases. Problem areas involving the disputes process is discussed including a comparison of Federal courts with the various Boards.
JA-140-17 Jan 84 24:00	**Recent Developments at Boards of Contract Appeals - The Private Bar View** A continuation of JA-140-16.
JA-140-18 Jan 84 55:02	**Impact of the Federal Court Improvement Act** Guest Speaker: Professor Ralph Nash, National Law Center, George Washington University, Washington, D.C. An overview of the reorganization of the federal courts and associated problems arising from implementation of the Federal Court Improvement Act.
JA-140-19 Jan 84 36:33	**The U.S. Claims Court's First Year** Guest Speaker: Judge H. Robert Mayer, U.S. Claims Court, Washington, D.C. A review of the significant activities of the U.S. Claims Court after the implementation of the Federal Court Improvement Act. The future direction of the court is discussed.
JA-140-20 Jan 84 59:15	**Suspension and Debarment** Guest Speaker: Brigadier General Richard Bednar, Assistant Judge Advocate General for Civil Law, Office of The Judge Advocate General, Washington, D.C. A review of the significant activity in the area of suspension and debarment is discussed. Focus is on the role of the agency in preparing and processing suspension and debarment actions.
JA-140-21 Jan 84 55:24	**The DOD Inspector General's First Year** Guest Speaker: Mr. Derek J. Vander Schaff, Deputy Inspector General, Department of Defense, Washington, D.C. An overview of the role of the DOD Inspector General and the programs, initiatives, and resources dedicated to the elimination of fraud and waste in government contracting.
JA-140-22 Jan 84 55:07	**Bid Protests: A Panel Discussion of GAO Practice, Part I** Guest Speakers: Mr. Seymour Efros, Associate General Counsel, General Accounting Office, Washington, D.C.; Mr. C. Stanley Dees of McKenna, Conner, and Cuneo, Washington, D.C.; and Mr. William A. Carroll, Associate Counsel, Contracts, Defense Logistics Agency, Alexandria, Virginia. Significant trends or changes in bid protest procedures as viewed by the private sector, the federal agency, and the GAO are presented.
JA-140-23 Jan 84 55:19	**Bid Protests: A Panel Discussion of GAO Practice, Part II** A continuation of JA-140-22.
JA-140-24 Jan 84 19:26	**Bid Protests: A Panel Discussion of GAO Practice, Part III** A continuation of JA-140-22 and JA-140-23.
	Sixth Administrative Law for Military Installations Course (November 1983)
JA-291-1 Nov 83 53:25	**Government Information Practices: Privacy Act, Part I** Speaker: Major John Joyce, Senior Instructor, Administrative and Civil Law Division, TJAGSA. Major Joyce discusses the Privacy Act and its implementation by the Army. He emphasizes the collection and maintenance of personal information by the government, the individual's right of access to and amendment of such information, the disclosure of that information within and outside of the government, and the various remedial provisions of the Act.
JA-291-2 Nov 83 47:16	**Government Information Practices: Privacy Act, Part II** A continuation of JA-291-1.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-291-3 Nov 83 50:52	**Government Information Practices: Interface of Privacy Act and FOIA** Speaker: Major John Joyce, Senior Instructor, Administrative and Civil Law Division, TJAGSA. Major Joyce discusses the relationship between Exemption 6 of the Freedom of Information Act and the withholding provisions of the Privacy Act. He emphasizes the applicable statutory provisions and recent case law.
JA-291-4 Nov 83 39:20	**Government Information Practices: Freedom of Information Act, Part I** Speaker: Major Michael Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Major Schneider discusses the Freedom of Information Act and its implementation in the Army. Emphasis is given to the categories of information covered by the Act, the disclosure requirements, and the application of the exemptions.
JA-291-5 Nov 83 49:57	**Government Information Practices: Freedom of Information Act, Part II** A continuation of JA-291-4.
JA-291-6 Nov 83 32:47	**Government Information Practices: Freedom of Information Act, Part III** A continuation of JA-291-4 and JA-291-5.
JA-291-7 Nov 83 54:20	**Military Personnel Law: Enlisted Separations for Marines, Part I** Guest Speaker: Captain Jim Walker, HQS, USMC. Captain Walker discusses recent developments in the area of military personnel law for Marine Corps enlisted personnel. He reviews the applicable DOD Directive and the implementing Separations and Retirement Manual, with emphasis on separations for unsatisfactory performance and misconduct.
JA-291-8 Nov 83 35:00	**Military Personnel Law: Enlisted Separations for Marines, Part II** A continuation of JA-291-7.
JA-291-9 Nov 83 45:20	**Overview of Environmental Law** Speaker: Major Michael Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Major Schneider reviews selected environmental law statutes that impact on the operation of military installations and reviews the extent of the commander's obligation to comply with local, state, and federal pollution abatement requirements.
JA-291-10 Nov 83 42:52	**Administrative Law Update, Part I** Guest Speakers: Colonel Carroll Tichenor, Chief, Administrative Law Division, OTJAG, and Mr. Sam Brick, Chief, Legislation Branch, Administrative Law Division, OTJAG. Colonel Tichenor discusses current administrative law problems and issues at the Administrative Law Division, OTJAG, to provide the student with an understanding of the major current administrative law issues and policy considerations that impact upon those issues. Mr. Brick explains the policies and procedures pertaining to the Army's processing and resolution of complaints submitted under Article 138, Uniform Code of Military Justice. He explains what matters are properly considered under Article 138 and common errors his office sees in Article 138 complaints. Mr. Brick also covers pending legislation and legislative proposals that may impact on the Army.
JA-291-11 Nov 83 58:37	**Administrative Law Update, Part II** A continuation of JA-291-10.
JA-291-12 Nov 83 25:54	**Administrative Law Update, Part III** A continuation of JA-291-10 and JA-291-11.
	11th Criminal Trial Advocacy Course (February 1984)
JA-367-1 Feb 84 47:42	**Direct and Cross-Examination, Part I** Guest Speaker: Mr. Patrick A. Williams of Williams, Donovan, Savage & Associates, Tulsa, Oklahoma, discusses direct examination, cross-examination and expert witnesses in criminal trials.
JA-367-2 Feb 84 49:25	**Direct and Cross-Examination, Part II** A continuation of JA-367-1.

4. Index Available for the FAR

Federal Legal Information Through Electronics (FLITE) has produced a unique index for the new Federal Acquisition Regulation (FAR). It is similar to indexes FLITE has produced in the past for the Defense Acquisition Regulation, the Military Rules of Evidence, and the Manual for Courts-Martial. Called a Key-Word-In-Context (KWIC) Index, it contains all but the most common words in alphabetical order. Each occurrence of each word is centered in one line of the index, surrounded by the words that precede and follow it in the FAR text. The citation at the end of each line identifies the FAR section in which the line appears. Multiple occurrences of the same word are listed in alphabetical order of the words following the indexed word.

Thus, a researcher needing to find all the occurrences of a particular word or phrase need only consult the appropriate part of the index to get section references. The few words preceding and following the word of interest will give some indication of how it is being used. FLITE distributes the index on microfiche free to all Department of Defense activities and to any other federal agency for a charge of $50.00. Orders may be placed by calling Autovon 926-7531 or Commercial/FTS (303) 370-7531, or by writing to FLITE, Denver, CO 80279.

For research that requires more than locating a single word or phrase, call the FLITE service center at the numbers listed above. The FAR has been added to the FLITE full text search and retrieval system which also includes most other legal authorities of interest to government contracting offices, notably, the published and unpublished Decisions of the Comptroller General, Board of Contract Appeals Decisions, and federal court decisions.

FLITE's research services are available free of charge to all Department of Defense activities and on a fee basis to all other federal agencies. FLITE prefers to receive search requests by telephone so that the research attorneys may discuss the subject with the requestor.

5. Articles

Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 Bull. Am. Acad. Psychiatry & L. 287 (1983).

Braunstein, *In Defense of a Traditional Immunity—Toward an Economic Rationale for Not Estopping the Government*, 14 Rutgers L.J. 1 (1982).

Brüggemeier, *Perspectives on the Law of "Contorts": A Discussion of the Dominant Trends in West German Tort Law*, 6 Hastings Int'l & Comp. L. Rev. 355 (1983).

D'Amato & Eberle, *Three Models of Legal Ethics*, 27 St. Louis U.L.J. 761 (1983).

Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 Iowa L. Rev. 1015 (1983).

Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 Den. L.J. 533 (1983).

Fisch, *Recent Developments in West German Civil Procedure*, 6 Hastings Int'l & Comp. L. Rev. 221 (1983).

Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 Cornell L. Rev. 468 (1983).

Ginsberg, *The Proposed Bankruptcy Improvements Act: The Creditors Strike Back*, 3 Nw. Ill. U.L. Rev. 1 (1982).

Goodman & Waltuck, *Declarations Against Penal Interest: The Majority Has Emerged*, 28 N.Y.L. Sch. L. Rev. 31 (1983).

Griffith, *Recent Developments in the Effort to Simplify Truth in Lending*, 19 Tulsa L.J. 30 (1983).

Lester, *The Magnuson—Moss Warranty Act: The Courts Begin to Talk*, 16 U.C.C.L.J. 119 (1983).

Lichtenstein, *Drug Detector Dogs and the Fourth Amendment: A Model Plan*, 11 Am. J. Crim. L. 67 (1983).

Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L.J. 5 (1983).

Marcel, *The Role of the Courts in a Legislative and Administrative Legal System—The Use of Hard Look Review in Federal Environmental Litigation*, 62 Or. L. Rev. 403 (1983).

Mark, *Issues in Asbestos Litigation*, 1983 Hastings L.J. 871.

Matthews, *The Scope of Claims Under the Bankruptcy Code (Second Installment)*, 57 Am. Bankr. L.J. 339 (1983).

McGough & Hughes, *Chartered Territory: The Louisiana Experience With the Uniform Child Custody Jurisdiction Act*, 41 La. L. Rev. 19 (1983).

Mednick & Finello, *Biological Factors and Crime: Implications for Forensic Psychiatry*, 6 Int'l J.L. & Psychiatry 1 (1983).

Mitchell, *Confessions and Police Interrogation of Suspects*, Crim. L. Rev., Sept. 1983, at 596.

Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 Loy. L.A.L. Rev. 227 (1983).

O'Brien, *The Courts and Science-Policy Disputes: A Review and Commentary on the Role of the Judiciary in Regulatory Politics*, 4 J. Energy L. & Pol'y 1 (1983).

Richardson, *Law Reviews and the Courts*, 5 Whittier L. Rev. 385 (1983).

Rose, *The Deductibility of Daily Transportation Expenses to and from Distant Temporary Work Sites*, 36 Vand. L. Rev. 541 (1983).

Seman, *The Federal Courts: Habeas Corpus and Recent Meanings of Cause and Prejudice*, 10 Am. J. Crim. L. 215 (1982).

Siniscalco, *Reductions in Force: Minimizing Exposure to Contract, Tort, and Discrimination Claims*, 9 Employee Rel. L.J. 220 (1983).

Teitelbaum, Sutton-Barbere Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?* 1983 Wis. L. Rev. 1091.

Vinson, *Litigation: An Introduction to the Application of Behavioral Science*, 15 Conn. L. Rev. 767 (1983).

Comment, *Chemical Analysis of Substances Discovered During Private Searches: The Fourth Amendment Implications*, 68 Iowa L. Rev. 1315 (1983).

Comment, *Employer Liability for Assaults by Employees*, 48 Mo. L. Rev. 655 (1983).

Comment, *Extending the Privilege Against Self-Incrimination to the Threat of Prosecution Under Foreign Law*, 35 Baylor L. Rev. 141 (1983).

Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 Ariz. St. L.J. 79.

Comment, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Crim. L. Rev. 569 (1982-1983).

Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983).

Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 Mich. L. Rev. 90 (1983).

Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 Duke L.J. 611.

Note, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 Geo. Wash. L. Rev. 420 (1983).

Note, *Videotaping for Classroom Use: Fair or Foul?* 61 Wash. U.L.Q. 435 (1983).

Note, *Violations of the Double Jeopardy Prohibition Under the Federal Parole Release System*, 63 B.U.L. Rev. 673 (1983).

Note, *What You Don't Know Will Hurt You: Physicians' Duty to Warn Patients About Newly Discovered Dangers in Previously Initiated Treatment*, 31 Clev. St. L. Rev. 649 (1982).

Special Project—An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983).

6. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 27-60	Legal Services Patent, Inventions, and Copyrights	901	22 Jan 84
AR 310-2	Military Publications, Identification and Distribution of DA Publication and Issue of Agency and Command Administrative Publications	C5	1 Dec 83
AR 360-61	Community Relations	C1	1 Jan 84
AR 635-100	Personnel—Officer Personnel	905	1 Oct 83
AR 690-1	Civilian Applicant and Employee Security Program (This regulation was superseded by AR 604-5, 1 Feb 84)	S	25 Sep 67
USU	Unit Supply Update, supersedes USU, 1 Sep 83		1 Dec 83
RCU-7	Reserve Components Personnel Update (Issue #7) supersedes Nov 83		1 Feb 84

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

U.S. GOVERNMENT PRINTING OFFICE: 1983—381-815:11